



Office of Command Counsel Newsletter

December 2001, Volume 2001-6

Newsletter Index Brought to you by CECOM

Revised Partnering Guide Issued

From the Editor:

Several of you have asked me to produce a Newsletter Index for easy research and retrieval of articles of interest.

During the pre-electronic area a cumulative Index was produced semi-annually,

When we went to electronic desk top publishing, your asleep-at-the-wheel editor did not continue the practice. My defense is that I never thought I would learn desk top publishing so why even think about a cumulative Index to something I would never be able to do?

Luckily, we have more astute and focused counsel in the AMC Legal Community.

CECOM has been a leading proponent of Newsletter contributions, so it is no surprise that without being asked (I would never have the nerve) they created an outstanding AMC Command Counsel Newsletter Index covering issues 97-1 through the June 2001 edition 01-3.

The Belvoir Legal Branch

of the CECOM legal community, headed by **John Metcalf** is responsible for this herculean effort. John gives credit to a summer hire **Marna Palmer** for leading this effort.

The Index is in two sections.

Part I: Topic and Alphabetical Title of Article.

Part II: Listed by Topic and Most recent Article.

The Index was sent to each AMC Legal Office during the first week in December. It will also be uploaded to the AMC Office of Command Counsel Web Site by our WebMaster **Josh Kranzberg**.

On behalf of all of us in the AMC legal community who will benefit from the Index a great deal of thanks to **Ms. Palmer, Mr. Metcalf** and to the **CECOM** legal community.

We are pleased to announce the publication of the revised AMC Partnering Guide, which includes a new section on Lessons Learned, new examples of various Partnering tools developed, and updated tips and pointers.,

The Guide will soon be uploaded to the AMC Command Counsel Home Page.

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Patents and Baseball

The Department of Commerce's United States Patent and Trademark Office joins in the celebration of this year's World Series by recognizing some patents and trademarks relative to baseball.

Baseball is America's pastime.

The thousands of patented inventions associated with the sport are testament to that. Most recently patents have been issued on a way to improve a batter's swing (patent #6,306,050); a swing speed indicator (patent #6,173,610) that measures the batter's swing using a digital readout that can be slipped onto any bat; a baseball trainer, which helps pitchers practice by indicating a "strike" or "ball" as well as the speed of the pitch by using a microcomputer (patent # 5,566,964); and a glove (patent #5,113,530) with inflatable chambers which softens the impact of an incoming baseball or softball.

There are also numerous patents for softball and t-ball. Design patent # 418,569 is for a t-ball matt, which helps chil-

dren position themselves to hit the ball. Patent #4,993,708 covers a batting tee. Design patent #402,414 is for a helmet that can be used for a player to pull their ponytail through while playing softball, t-ball or little league baseball.

Trademarks also play an important role in baseball and are seen on and off the field. Most professional team logos, equipment and even mascots, have trademark registrations.

The New York Yankees, which have won the most World Series Championships, have a very well known and recognized logo, which has trademark registration #1898998 for use on baseball shirts. The Arizona Diamondbacks, a relatively new team, has several trademark applications pending, including serial #76161641 for baseball uniforms and

other sport-related clothing. Trademarks for baseball equipment include Rawlings (registration #1149932) and Wilson (registration #1553005) for sporting good equipment such as baseballs, gloves, and bases.

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Contributions are encouraged. Please send them electronically as a Microsoft® Word® file to sklatsky@hqamc.army.mil

Check out the Newsletter on the Web at http://www.amc.army.mil/amc/command_counsel/

Letters to the Editor are accepted. Length must be no longer than 250 words. All submissions may be edited for clarity.

Acquisition Law Focus

OMB Circular A-76 Case Law Rights in Computer Software

The CECOM Legal Office provides a compendium of cases interpreting the provisions of OMB Circular A-76. Included are Federal court cases and decisions by the General Accounting Office. The period covered is 1993-2001.

Several of the more interesting and meaningful decisions deal with the issue of whether a Federal employee union has standing to sue alleging violations of the provisions of the Circular (Encl 1)

CLE 2002 Information in the February 2002 Newsletter

DOD Intellectual Property ("IP") Policy generally provides that:

- Contractors keep ownership, or title, to Computer Software developed under DOD contracts;
- Government receives a nonexclusive license to use Computer Software delivered under DOD contracts;
- License Rights in commercial computer software should be similar to those customarily provided to the public provided the Government's needs are satisfied.

Within this broad framework, DOD IP policy, procedures and regulations are found at FAR Part 27, DFARS Part 227 and the associated contract clauses.

The Government's license rights in Noncommercial Computer Software are divided into four (4) broad categories:

The enclosed paper addresses and discusses these categories.

POC is CECOM's **George Tereschuk**, DSN 992-9795 (Encl 2).

List of Enclosures

1. OMB Circular A-76 Case Law
2. Rights in Computer Software
3. Is McKinney Still Applicable to DOD Leases
4. Patent Term Extension
5. End-Use Certificates-Guidance to KOs
6. Handling Post-Award Problems
7. Impact of DA Policy on Commerical Item
8. ARL-FED Lab Program Recompeted
9. Joint Statement Against Discrimination
10. Soldiers' & Sailors; Relief Act
11. Being Mobilized-Worried About Your Job?
12. DOD Telecommuting Labor Relations Policy
13. Env Law Spec Wkshop
14. The Military & the Endangered Species Act
15. Coordinating Environmental Agreements
16. Covered Relationships
17. The Lexis Corner

Acquisition Law Focus

Is McKinney Still Applicable to DOD Leases? End-Use Certificates

TACOM ARDEC Counsel **Jerry Williams**, DSN 880-6598 provides an article asking the above-captioned question. Sec. 2812 of the National Defense Authorization Act For Fiscal Year 2001 may have subtly removed any statutory requirement that DoD agencies provide HUD with notification that property will be made available for leasing under 10 USC 2667.

Under the Stewart B. McKinney Homeless Assistance Act (42 USC 11411), agencies are required to identify to HUD any property or buildings that are "excess property or surplus property or that are described as unutilized or underutilized in

surveys by the heads of land-holding agencies under section 202(b)(2) of the Federal Property and Administrative Services Act of 1949 4USC 483(b)(2))." 41 CFR 101-47.801 establishes the standards that executive agencies shall use in identifying unneeded federal property, and 45 CFR 12a.1 defines "excess," "surplus," "unutilized," and "underutilized" property in the use of federal property to assist the homeless.

Mr. Williams suggests that Section 2812 of the FY01 Defense Authorization Act may have struck previous requirements found at 10 USC 2667(a) (Encl 3)

Patent Term Extension: What to do and What to Avoid

Under the Trade-Related Aspects of Intellectual Property Rights (TRIPs) of General Agreement on Trade & Tariffs (GATT), a great change was brought about to the term of an issued utility or plant patent. The old certainty of 17 years from the date of issue, no matter how long the pendency of the application, was replaced by a term that

began on the issue date of the patent and ran for 20 years from the earliest effective filing date of the application that matured into the patent.

AMCOM's **Hay Kyung Chang (Anne Lanteigne)**, DSN 746-8922, provides a paper describing the impact of the American Inventors Protection Act of 1999 and its patent term adjustment provisions (Encl 4)

TACOM-ARDEC counsel **Kenneth Hanko** DSN 880-6587 has provided a paper offering practical guidance to contracting officers regarding end-use certificates.

For a number of years, the United States has required foreign purchasers of armaments and other equipment on the U.S. Munitions List to provide assurances against third party transfer and certain uses without the consent of the United States Government ("USG"). These are commonly referred to as EUCs.

The International Traffic in Arms Regulations ("ITARs") (which contains the U.S. Munitions List), requires the execution of a "nontransfer and use certificate".

In the Foreign Military Sales context, similar assurances are included in the terms and conditions of the LOA. Direct commercial sales require an authorized representative of a foreign country to provide comparable assurances in the form of a separate EUC (Encl 5).

Handling Post-Award Problems:

CECOM's **Arnold Schlisserman** DSN 992-9809 provides an article discussing the various post-award problems that arise, such as constructive changes, delays in contract performance, acceptance of non-compliant items, and other forms of government conduct that causes the contractor's costs to increase. Potential remedies and options are explored.

The article concludes by stating that the most important points to take away from this discussion are that our responsibilities don't end with the award of the contract.

Good communication within the Government and between it and the contractor through the application of effective "Partnering" processes will avoid many post-award problems.

When they can't be avoided, however, the Legal Office can help the Contracting Officer get to a resolution that will be both fair and final (Encl 6).

Impact of DA Policy on Commercial Items

In a memorandum dated 5 January 2001, issued by the Under Secretary of Defense for Acquisition and Technology, a Department of Defense (DoD) review found inconsistent commercial item determinations and weak market research among the obstacles that exist to broadening the use of commercial items within the DoD.

By memorandum dated 26 March 2001, Subject: Commercial Acquisitions, the Acting Assistant Secretary of the Army (Acquisition, Logistics and Technology) issued an Implementation Plan for Increasing the Use of FAR Part 12. It announced a policy that all services (with the exception of services under FAR Part 36) were presumed to be commercial and that FAR Part 12 policies and procedures would be used to buy these services.

CECOM's **Marla Flack**, DSN 992-5057, provides an article that addresses and discusses two issues related to the DA Policy (Encl 7).

Recompetes FED Lab CTA Program

The mid 1990s presented the DoD research community with a unique set of circumstances, the Defense budget was being significantly reduced, while breakthroughs in various technologies offered opportunities for improving American warfighting capabilities. The Army Research Laboratory (ARL) attempted to address this situation with the implementation of the Federated Laboratory (Fed Lab) Program. The goal of Fed Lab was to establish a collaborative research environment bringing together the best researchers from academia, industry and the government.

The program was deemed a significant success and was just recently recompeted and expanded in 2001. This article discusses the lessons learned, and details the arduous process of implementing the successor to Fed Lab, the Collaborative Technology Alliances (CTA) Program.

POC is ARL Counsel **Pat Emery**, DSN 290-1696 (Encl 8).

Employment Law Focus

Joint Non-Discrimination Statement Issued

In response to the September 11, 2001 terrorist attacks, the US Department of Justice, US Department of Labor and the US Equal Employment Opportunity Commission published a joint statement to “reaffirm the Federal government’s commitment to the civil rights of all working people.”

The policy was issued in part because these agencies continued to receive reports of incidents of harassment, discrimination, and violence in the workplace against individuals who are, or are perceived to be, Arab, Muslim, Middle Eastern, South Asian, or Sikh.

The policy states: “When people are singled out for unfair treatment or are harassed based on their national origin, immigration status, ethnicity, or religious affiliation, practices, or manner of dress, we must act quickly to address and redress these acts of discrimination” (Encl 9).

Supreme Court Rules on Penalties When Disciplinary Actions Are Pending

The United States Supreme Court held unanimously (opinion by O’Connor; concurrences by Thomas and Ginsburg) that the Merit Systems Protection Board’s practice of reviewing pending disciplinary actions to support a penalty’s reasonableness under the Civil Service Reform Act is not contrary to law.

Gregory was fired from her position as a letter technician with the Postal Service in Georgia, because she allegedly overestimated the delivery time of her route by approximately one and one-half hours. At her grievance proceeding, the Merit Systems Protection Board (Board) affirmed Gregory’s termination, holding that the penalty was justified by Gregory’s prior disciplinary record, part of which consisted of pending disciplinary action at the time.

Gregory appealed to the United States Court of Appeals for the Federal Circuit, which reversed the Board’s determination that Gregory’s termination was reasonable. The Court of Appeals held invalid the Board’s consideration of pending disciplinary actions against Gregory.

The United States Supreme Court reversed, holding that the Board had wide latitude in fulfilling its obligation to review agency disciplinary actions under the Civil Service Reform Act. The Court concluded that the Board’s practice of considering pending disciplinary actions was not arbitrary, because a contrary practice would result in undue delay. Furthermore, the practice is not inconsistent with any law. The Board is therefore not required to accept the Federal Circuit’s rule in order to meet its statutory obligations.

Employment Law Focus

Mobilization Issues

CECOM's **Pamela McArthur**, DSN 992-4760 provides two articles relevant to the impact of mobilization of soldiers and civilian employees

The Soldiers' and Sailors' Civil Relief Act (SSCRA) is a federal statute (50 U.S.C. app. §§ 500-591), that allows military personnel, and sometimes military dependents, to postpone or suspend some civil obligations so they can devote their energy and attention to the defense needs of the Nation.

This article is intended to provide general information about portions of the SSCRA that many of our clients may come into contact with, but is not a substitute for seeing an attorney.

If you think your situation involves a protection under the SSCRA, see an attorney for a more detailed discussion about your rights and responsibilities (Encl 10).

Telecommuting Policy

The DOD Telework Policy and Guide are available on the Interagency Telework Website, at <http://www.telework.gov/dodpolicy.htm> and <http://www.telework.gov/dodguide.htm> respectively.

The Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) is a federal law that gives employees who leave a civilian job to perform military service the right to return to the civilian job held before entering military service(Encl 11).

USERRA protection applies if you meet all five of these tests:

1. Job. Did you have a civilian job before you went on active duty?
2. Notice. You must give notice to your employer.
3. Duration. As a general rule, you can be on active duty away from your civilian job for up to five years.
4. Character of service. USERRA protections apply if you are discharged with an Honorable or General discharge.
5. Prompt return to work

www.telework.gov/dodguide.htm respectively.

Also enclosed is DOD Labor Relations Guidance on Telecommuting provided as always by HQ DA's **David Helmer** (Encl 12).

Authority to Contract for Security Functions

HR 3162, USA Patriot Act, signed by the President on October 26, includes the following provision on contracting for guards. .

SEC. 1010. TEMPORARY AUTHORITY TO CONTRACT WITH LOCAL AND STATE GOVERNMENTS FOR PERFORMANCE OF SECURITY FUNCTIONS AT UNITED STATES MILITARY INSTALLATIONS.

(a) IN GENERAL- Notwithstanding section 2465 of title 10, United States Code, during the period of time that United States armed forces are engaged in Operation Enduring Freedom, and for the period of 180 days thereafter, funds appropriated to the Department of Defense may be obligated and expended for the purpose of entering into contracts or other agreements for the performance of security functions at any military installation or facility in the United States with a proximately located local or State government, or combination of such governments, whether or not any such government is obligated to provide such services to the general public without compensation.

Environmental Law Focus

Environmental Law Specialist Workshop Highlights

On 1 November 2001, the Army Environmental Law Division sponsored an excellent workshop to provide the latest information on the significant environmental issues facing the Army. The workshop topics included:

a. Litigation Update

- Judgment Fund Availability
- Makua Range Litigation

b. Restoration/Natural Resource Update

- Privatizing BRAC Cleanups
- NEPA Alternate Arrangement for Emergency Circumstances and ESA Update

c. Compliance Update

- Payment of Administrative Fees for CAA Violations
- Fort Wainwright CAA Case
- Range CWA Permitting Update

d. AEC Update

- New Army Alternate Procedures (AAP) for NHPA Section 106 Consultation.

A more detailed summary of the workshop presentations is provided at Enclosure 13.

If you have any questions, please contact **Stan Citron** at DSN 767-8043.

The Military and the Endangered Species Act

The Department of Defense and the Fish & Wildlife Service recently prepared a fact sheet entitled "The Military and the Endangered Species Act – Interagency Cooperation".

The fact sheet provides a concise summary of the Endangered Species Act (ESA). It explains the ESA consultation process, the critical habitat designation process, and highlights useful DoD and other ESA guidance (Encl 14).

AMC Environmental Agreement Coordination Policy

AMC issued guidance on coordinating environmental agreements on 6 April 2001. The guidance is an excellent resource for environmental attorneys who are faced with negotiating an environmental

agreement to resolve an environmental fine or other compliance issue. The guidance provides a concise summary of the Army notification requirements, the negotiation process, and the approval pro-

cess for environmental agreements. It also includes the draft DA Pam 200-1 Consent Agreement Checklist and the ELD CACO Checklist which provide useful information (Encl 15).

Ex-Client Rules Apply When Lawyer Joins Government

Covered Relationships

Even though there is no rule expressly addressing potential conflicts of interest that may arise when a lawyer leaves private practice to take a government job, the District of Columbia bar's ethics panel has cautioned that government attorneys may be conflicted out of projects that are substantially related to matters they handled for former clients (District of Columbia Bar Legal Ethics Comm., Op. 308, 6/26/01).

Government attorneys also are prohibited from revealing their former clients' confidences, the committee said, or using client information in a way that would work to the former client's disadvantage.

The panel stressed, how-

ever, that the principles of imputed disqualification — which prohibit all lawyers in a firm from representing a client if any one of them would be prohibited from doing so — do not apply to block a disqualified government lawyer's colleagues from pursuing the matter. Vicarious disqualification would have "draconian effects" on the government's ability to secure legal services, the committee said. In this instance, the opinion recommends that the government agency adopt voluntary screening measures to insulate the disqualified lawyer from any contact with the matter at issue.

Thanks to **Carrie Schaffner**, Ethics Counsel at TACOM-Rock Island, DSN 793-8444

By regulation, employees may not participate in official matters when someone with knowledge of the relevant facts would reasonably question their impartiality.

An employee could have an appearance of a conflict of interest when a member of the employee's household or someone with whom the employee has a "covered relationship" is a party to the official matter, or represents a party to that matter.

Additionally, an employee who is concerned that other circumstances would raise questions about the employee's impartiality should notify the agency to allow it to determine whether the employee should participate in a particular matter.

AMC Ethics Team Chief **Bob Garfield**, DSN 767-08003, provides an information paper on this important and reoccurring problem (Encl 16).

The Lexis Corner--December 2001

Thanks to AMC Lexis representative **Rachel Hankins** for her latest issue for the Lexis Corner (Encl 17). rachel.hankins@lexisnexis.com.

This issue highlights several issues:

Document Page Count

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per right corner) and check the box next to "Show floating pagination assistant."

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Faces In The Firm

Hello

STRICOM

Beverly Fisher is STRICOM's new Paralegal Specialist. She previously worked in STRICOM's Human Resources Division.

AMCOM

Carol Howard, who has been assigned as the secretary for the Acquisition Law, Branch C.

Georgia M. Kirkland, has been assigned in the Claims office for JAG. She comes to us from CIC.

CPT Anthony C. Adolph is assigned to the Acquisition Law Division, Branch A

1LT Douglas Moore, who has been assigned to the JAG office.

1LT William W. Carpenter assigned to the JAG office

SGT Ronnie W. Yates assigned to the JAG office, comes from Ft. Poke, LA

PVT Rachel L. Arnold, assigned to the JAG office, comes to us from AIT.

CCAD

Alejandro Lopez from the Corpus Christi City Attorney's Office.

Ken Muir from the Immigration and Naturalization Service in Harlingen, TX.

Edwin Richards from the Legal Office at Camp Zama, Japan.

Jerry Parr, GS-09 Paralegal Specialist from the Illinois Secretary of State Office in Springfield, IL.

Delmi Castillo, GS-06 Secretary from the CCAD Training Office.

Promotions

AMCOM

Congratulations to **Debbie Moore**, who has been promoted to Chief, Plans and Operations.

Congratulations **Rhenda Miltner** who has been promoted to GS-9 in the Legal Library.

STRICOM'S Laura Cushler activated and deployed

Laura Cushler, STRICOM Attorney-Advisor, was recently activated as a JAG with the Florida National Guard. She is currently stationed at Ft. Bliss, Texas. Please keep her in your thoughts and prayers

Temporary Assignment as JAG Reservists

HQ AMC welcomes **MAJ Art Lees**, who many will remember for his days as an attorney with Vint Hill Farms Station. Art is assigned to the Business Law Operations Division.

Also **MAJ Al Glamba** who is a Contract Law Attorney at Fort Lewis, Washington now temporarily assigned to the General Law Division.

Cases Interpreting the Provisions of OMB Circular A-76

Federal Court Cases 1993-2001

American Federation of Government Employees (AFGE) v. United States, 258 F.3d 1294, CAFC No. 00-5090, July 23, 2001.

- The Court of Appeals for the Federal Circuit (CAFC) affirmed the Court of Federal Claims (COFC) decision that the American Federation of Government Employees (AFGE) does not have standing to sue the United States for allegedly not properly conducting an OMB Circular A-76 cost comparison. The CAFC held that the plaintiffs lacked standing because they were not actual or prospective bidders or offerors.

American Federation of Government Employees (AFGE) v. United States, 2001 U.S. Dist. LEXIS 4044 (W.D. 2001)

- The court held plaintiff lacked standing to sue the Air Force for allegedly violating its own regulations and instructions, in particular Office of Management and Budget (OMB) Circular A-76, because A-76 cannot create enforceable rights in third parties. OMB Circular A-76 is not a statute and cannot form a basis for standing. Federal employees are not within the “zone of interests” intended to be protected by A-76.

American Federation of Government Employees (AFGE) v. Major General George T. Babbitt, Air Force Materiel Command, et al., 2001 U.S. Dist. LEXIS 5426 (S.D. 2001)

- Defendant’s motion to dismiss plaintiff’s claim of failure to follow OMB Circular A-76 when contracting out was granted for lack of standing. The court concluded that the plaintiffs lacked the requisite standing because they 1) relied on OMB Circular A-76 to satisfy the prudential standing requirements, 2) fell outside the “zone of interests” protected or regulated by the various statutes, 3) asserted a generalized grievance which is insufficient to establish standing, and 4) the plaintiff (AFGE) lacked “associational standing” because the individual plaintiffs lacked standing.

Moore v. United States Navy, 2001 U.S. Dist. LEXIS 4469 (N.D. Fl. 2001)

- Plaintiff's motion for preliminary injunction against defendant for expending funds on a commercial activities study in violation of federal law and Department of Defense Regulations, OMB Circular A-76, was denied because plaintiff lacked standing and ripeness. The court held plaintiff did not have an injury in fact to create standing and there was no binding and conclusive administrative decision to be reviewed so the issue was not ripe.

Rust Constructors v. The United States, 2001 U.S. Claims LEXIS 92 (Cl. Ct. 2001)

- The court held the Government is not required to perform a "best value" comparison between the Government's in-house offer and the successful private sector offer when conducting an A-76 Study. The Government is only required to compare the in-house offer with the private sector offer to determine that they are offering the same level and quality of performance. The court denied plaintiff's motion for summary judgment and granted defendant's cross-motion for judgment upon the administrative record.

American Federation of Government Employees (AFGE) v. United States, 104 F. Supp. 2d 58 (D.C. 2000)

- Plaintiff's motion for preliminary injunction against the Air Force for suspending the OMB Circular A-76 process was denied and the Air Force decided to award the contract to a Native-American firm as outlined under Pub. L. No. 106-79, § 8014, which contains a preference for award to Native American firms. The plaintiffs alleged that the award violated the equal protection clause under the 5th Amendment. The motion was denied because the plaintiffs failed to meet the burden of justifying the extraordinary remedy of a preliminary injunction. Additionally, the plaintiffs lacked standing concerning one of the allegations.

American Federation of Government Employees (AFGE) v. William J. Clinton, President of the United States, et al., 180 F.3d 727 (6th Cir. 1999).

- Plaintiffs AFGE and present and former Government employees, appealed the United States District Court for the Southern District of Ohio's decision dismissing their claim for lack of standing. The U.S. Court of Appeals for the 6th Circuit affirmed the dismissal. The court held that the plaintiffs' asserted injuries were too speculative, and insufficiently concrete and particularized to establish Article III standing.

Inter-Con Security Systems v. Secretary of the Air Force, 1994 U.S. Dist. LEXIS 10995 (N.D. CA 1994)

- Plaintiff filed a timely bid protest against defendant Air Force after defendant concluded through an OMB Circular A-76 study that the contract should remain in-house. Under the Competition in Contracting Act (CICA) the defendant was precluded from awarding a contract if a timely bid protest was filed with the General Accounting Office (GAO). The court held that the CICA stay provision did apply because defendant's decision to retain the work in-house was the equivalent of a contract award. Accordingly, plaintiff's motion for an injunction was granted.

U.S. Department of the Treasury v. Federal Labor Relations Authority, 996 F.2d 1246 (D.C. Cir. 1993)

- When a Government-wide regulation under § 7117(a) of OMB Circular A-76 is itself the only basis for a union grievance, the regulation precludes bargaining over its implementation and prohibits grievances concerning alleged violations. The Federal Labor Relations Authority may not require a Government agency to bargain over grievance procedures directed at implementation of the regulation. The court denied enforcement of the defendant's order to negotiate.

Comptroller General 1993 – 2001

TDF Corporation, B-288392, (October 23, 2001)

- The Department of the Army (DA), pursuant to the provisions of OMB Circular A-76, issued a solicitation in order to select a private contractor to compete with the agency's Most Efficient Organization (MEO). The agency performed a preliminary evaluation of TDF's proposal and concluded it contained several deficiencies. Though the proposal was deemed inadequate, the agency told TDF it would be included in the competitive range, but that the proposal could be removed from the competitive range if the defects were not resolved. TDF made revisions and additions to the proposal but the Source Selection Authority (SSA) determined that TDF's proposal would no longer be considered.
- TDF, in turn, filed this protest alleging it was unreasonable for the agency to exclude its proposal from consideration because the agency failed to properly apply the evaluation factors stated in the solicitation. TDF also contends that elimination of its proposal was improper due to an alleged conflict of interest on the part of two members of the nine-member evaluation team who held positions in the function under study. The agency responded by saying that the two positions in question were deemed "Government in nature" and, therefore, these positions were not subject to being contracted out. The Comptroller General did not sustain the protest because it found no merit to TDF's contentions and held

no conflict of interest existed because the positions were not directly affected because they were not in jeopardy of being contracted out.

COBRO Corporation, B-287578.2, (October 15, 2001)

- COBRO alleged that the Army Materiel Command's (AMC's) RFP improperly required private-sector offerors to propose their own facilities to physically store inventory and maintain newly acquired equipment, rather than using existing and available Government facilities. In addition, COBRO alleged that AMC did not properly account for the comparable costs under the MEO associated with the facility provision in the private sector proposals. COBRO challenged AMC's decision to keep the work in-house because it believed the cost comparison was inadequate. The Comptroller General stated that "to preserve the integrity of the A-76 cost comparison, private-sector offerors and the Government must compete on the same scope of work." The Comptroller General decided that there was no basis for AMC not to make existing Government facilities available to offerors and recommended that AMC prepare a new RFP for private sector competition making the Government facilities available.

DynCorp Technical Services LLC, B-284833.3, (July 17, 2001)

- The Comptroller General sustained DynCorp's protest over the Air Force's decision to retain in-house rather than contract out performance of base operations at Maxwell Air Force Base and Gunter Annex. The Air Force's decision to retain the services in house was a result of a cost comparison pursuant to OMB Circular A-76.

Lackland 21st Century Services Consolidated, B-285938.6, 2001 U.S. Comp. Gen. LEXIS 108 (July 13, 2001)

- The Comptroller General dismissed Lackland 21st's (L-21's) request to reinstate its protest concerning the Air Force's decision that it would be more economical to perform base operations in-house rather than contract out to L-21, because the Comptroller General said it was rendered academic when the Air Force conceded its decision was improper and it intended to award L-21 the contract. Additionally, the Comptroller General stated that it does not reinstate protests; a protest "once academic is not "revived" by subsequent agency action," it just gives rise to a new basis for protest. The Comptroller General also dismissed L-21's request for reimbursement of protest costs based on the agency's failure to properly implement the corrective action it promised, because it held it was reasonable for the Air Force to await the conclusion of the Inspector General's review before awarding the contract to L-21.

Johnson Controls World Services, Inc., B-286714.2, 2001 CPD ¶ P20 (2001)

- The Comptroller General sustained Johnson Controls' protest claiming that DA's award of a contract to IT Corporation created an organizational conflict of interest (OCI) and, therefore, the award was improper. The Comptroller General concluded that an OCI did exist because IT Corp's subcontractor (INNOLOG) was under another contract with the Army and accordingly, IT should have been excluded from competing. The Comptroller General recommended that the Army review the apparent OCI and consider if it could feasibly be avoided and if not the Army should terminate the contract with IT Corp.

LBM, Inc., B-286271 (December 1, 2000)

- The Comptroller General denied LBM's protest concerning its allegation that the agency's solicitation requirement was inappropriate in that it was overly restrictive of competition and exceeded the agency's actual needs. The Comptroller General found that the agency's solicitation requirement was reasonable. However, in dicta, the Comptroller General did find that the agency's requirement that the offeror must obtain certification prior to submitting a proposal would unreasonably exclude potential offerors. The Comptroller General said competition would be stifled especially in the context of an A-76 cost comparison, "where the time between submission of proposals and actual commencement of the contract activities may be substantial."

N&N Travel & Tours, Inc., B-285164.2, 2000 U.S. Comp. Gen. LEXIS 128 (2000)

- The Comptroller General sustained N&N's protest concerning the issuance of the Air Force's solicitation for an Indefinite Delivery/Indefinite Quantity (ID/IQ) contract because the Air Force improperly included an in-house bidder when they were required through Department of Defense (DoD) regulations to reserve this solicitation for small business bids. N&N claimed the Air Force violated OMB Circular A-76 by converting travel management services from a contracted-out activity to an in-house activity. The Comptroller General agreed with N&N because the Air Force did not clearly state it was using the General Services Administration (GSA) to procure services, therefore, bidders correctly assumed that the Air Force would follow DoD procedures.

Symvionics, Inc., B-281199.2 (March 4, 1999)

- The Comptroller General denied Symvionics' protest concerning the Air Force's decision to retain housing management functions in house, rather than contracting for those services. Symvionics alleged in its protest that the Air Force failed to seal its management plan/most efficient organization (MP/MEO) prior to Symvionics' proposal submission, which was contrary to OMB Circular A-76 guidelines. In addition, Symvionics alleged that the Air Force failed to specifically allocate replacement hours or to describe in detail how replacement personnel would handle tasks previously proposed for volunteers. The Comptroller General stated that the Air Force's failure to seal the MEO prior to Symvionics' submission of its proposal did not materially affect the cost comparison because the MP had already been approved. With regard to Symvionics' second claim, the Comptroller General held that the number of personnel and labor hours is more than sufficient to cover volunteer effort and to meet all performance work statement responsibilities. Therefore, the Comptroller General denied Symvionics' protest.

DZS/Baker L.L.C. & Morrison Knudsen Corporation, B-281224 (January 12, 1999)

- The Comptroller General sustained DZS/Baker L.L.C. and Morrison Knudsen Corporation's ("DZS") protest of the Air Force's decision to retain operations in-house under an OMB Circular A-76 evaluation as invalid because of the existence of a conflict of interest. The Comptroller General held that because the team evaluating the proposals submitted under the A-76 process consisted of a large number of agency evaluators that held positions under the study and were thus subject to being contracted out, a conflict of interest was created. This significant conflict of interest on the part of the agency evaluators rendered the decision to retain services in-house invalid and did not provide a proper basis for cancellation of the solicitation. The Comptroller General sustained DZS' protest and recommended that the agency rescind the cancellation, create a new technical evaluation team, and reevaluate the proposals. DZS was also reimbursed for its cost of filing and pursuing the protest.

Southwest Anesthesia Services, B-279176.2, 1998 U.S. Comp. Gen. LEXIS 259 (1998)

- The Comptroller General will not review an agency's decision to perform services in-house, unless there is an allegation of a statutory violation or if the agency issued a solicitation for the purpose of conducting a cost comparison under OMB Circular A-76. The Comptroller General denied Southwest Anesthesia's protest that Indian Health Services improperly cancelled its solicitation to perform the contract in-house because it was trying to avoid awarding the contract to Southwest Anesthesia due to animosity. The Comptroller General held that the agency's decision to perform the contract in-house was reasonable.

Pemco Aeroplex, Inc., Aero Corporation, B-275587.9, 1998 U.S. Comp. Gen. LEXIS 250 (1998)

- The Comptroller General held that a solicitation may be cancelled after a protest is filed as long as the agency has a reasonable basis for doing so. The Comptroller General held that the Air Force had a reasonable basis for canceling its solicitation, in that it would save money and be the best use of the Air Force's capacities and resources.

J & E Associates, B-278187, 1998 U.S. Comp. Gen. LEXIS 34 (1998)

- J & E contends that its proposal was misevaluated under the management plan and past performance factors compared to the evaluation of the awardee's proposal. The Comptroller General denied J & E's protest because the agency's

evaluation of J & E's proposal was reasonable and consistent with the solicitation's evaluation criteria.

Orbital Sciences Corporation, B-254698, 94-1 CPD ¶ P2 (1994)

- Orbital Sciences Corporation (OSC) protests the terms of and Invitation For Bids (IFB) issued by the Department of Commerce alleging that the solicitation was defective because it violated 41 U.S.C. § 253(c) in that the bidders should not have been required to demonstrate, at their own expense prior to award, that their products met all applicable specifications. The Comptroller General denied OSC's protest because when using OMB Circular A-76, the agency's decision to award the contract to another company was reasonable because its bid was lower than OSC's.

Ameriko Maintenance Company, B-253274, 93-2 CPD ¶ P121 (1993)

- The Comptroller General denied Ameriko's protest because it held that the contracting agency properly made a price/technical tradeoff in awarding the contract to the higher priced, higher technically rated offeror. This tradeoff was proper because the record showed it was reasonably based on the awardee's significantly superior rating in the agency's most important areas of evaluation.

Daniels Manufacturing Corporation, B-253637, 93-1 CPD ¶ P439 (1993)

- The Comptroller General dismissed Daniels' protest because the GAO will not review a bid protest challenge to an agency's intention to perform a manufacturing effort in-house instead of contracting with the private sector when no competitive solicitation has been issued for cost comparison purposes under OMB Circular A-76 since such a matter is one of executive branch policy.

BAE Systems, B-287189, 2001 U.S. Comp. Gen. LEXIS 77 (2001)

- The Comptroller General sustained BAE's protest that DA had failed to comply with OMB Circular A-76 requirements. The Comptroller General held that the SSA had failed to consider strengths identified in the private sector offer when comparing it to the in-house offer. In addition, once the SSA became aware that the in-house offer did not meet the requirements of the PWS he had to ensure the in-house offer complied with the PWS prior to the cost comparison. The Comptroller General rejected the protestor's argument that if the in-house offer cannot comply with the PWS requirements it should be rejected holding that it is the agency's obligation to either ensure that the in-house offer is adjusted to satisfy the PWS or if the minimum requirements are relaxed or waived to revise the PWS and allow the private sector offeror to meet the new requirements.

Jones/Hill Joint Venture, B-286194.3, 2001 U.S. Comp. Gen. LEXIS 57 (2001)

- The Comptroller General recommended that Jones/Hill be reimbursed its costs of filing and pursuing its protest because the agency unduly delayed in taking corrective actions in its conduct of an A-76 Study in which it did not comply with the requirements of OMB Circular A-76.

BMAR & Associates, B-281664, 99-1 CPD ¶ P62 (1999)

- The Comptroller General sustained BMAR's protest by concluding that the Air Force's lump sum pricing scheme was inconsistent with the statutory requirement for full and open competition. However, the Comptroller General did agree with the Air Force that a Technical Performance Plan (TPP) is not required by the Government for evaluation under the first step of a two-step sealed bid acquisition to determine whether a private sector or Government in-house bid is preferable.

Aberdeen Technical Services, B-283727.2, 2000 CPD ¶ P46 (2000)

- The Comptroller General held that the Army's in-house cost estimate, computed under the requirements of OMB Circular A-76, was improper because the Army failed to include the full costs for a Program Manager and other key personnel required by the solicitation. The Comptroller General also sustained ATS' protest on the grounds that the Army did not follow OMB Circular A-76 requirements for comparing the "best-value" private sector offer with the Government's MEO.

Trajen, Inc., B-284310, 2000 CPD ¶ P61 (2000)

- The Comptroller General sustained Trajen's protest concluding that the Navy's appeal authority lacked a reasonable basis for reversing the cost comparison determination that contractor performance was more economical than in-house performance. The Agency's appeal authority improperly adjusted Trajen's bid upward concerning such costs as federal income tax adjustment and one-time conversion costs in order to make the in-house bid more desirable. The Comptroller General recommended that the appeal authority review the cost comparison, make the proper adjustments to Trajen's bid and, if appropriate, award the contract to Trajen.

Rice Services, Ltd., B-284997, 2000 CPD ¶ P113 (2000)

- In conducting a "best value" source selection, if the Government identifies "strengths" in the successful private sector offeror's proposal or areas in which it

exceeds the requirements of the PWS, the Government must consider these “strengths” in comparing that proposal with the in-house offer to determine if they are both offering the same level and quality of performance.

Imaging Systems Technology, B-283817.3, 2001 CPD ¶ P2 (2000)

- The Comptroller General did not consider Imaging Systems' allegations regarding the Air Force's failure to comply with OMB Circular A-76 because the circular does not, in and of itself, constitute a valid basis of protest. Without a solicitation, which typically commits the agency to following the Circular provisions in conducting public/private cost comparisons, compliance with OMB Circular A-76 is simply a matter of following executive branch policy.

American Federation of Government Employees (AFGE), B-282904.2, 2000 CPD ¶ P87 (2000)

- The Comptroller General dismissed a protest made by federal employees and the unions representing them, alleging that they would be adversely affected by an agency's decision pursuant to OMB Circular A-76 to contract for work rather than perform it in-house. The protest was dismissed because the Comptroller General determined that AFGE was not an actual or prospective bidder or offeror and, therefore, were not interested parties eligible to maintain a protest at the GAO.

IT Facility Services-Joint Venture, B-285841, 2000 CPD ¶ P177 (2000)

- The Comptroller General denied IT's protest concluding that the Army reasonably rejected IT's proposal and that no conflict of interest existed when four Fort Lee employees served on the Source Selection Evaluation Board (SSEB) because none of them held positions under the study and, therefore, these employees would not be directly affected by the cost comparison as their positions were not in jeopardy. The Comptroller General also rejected IT's protest that the agency's use of a contractor to assist in the preparation of the MEO and the evaluation of private sector offers created a conflict of interest as the contractor used discrete sets of employees to perform different tasks and used a "firewall " to keep confidential the preparation of the MEO and management study.

Rights In Computer Software

DOD Intellectual Property (“IP”) Policy generally provides that:

- Contractors keep ownership, or title, to Computer Software developed under DOD contracts;
- Government receives a nonexclusive license to use Computer Software delivered under DOD contracts;
- License Rights in commercial computer software should be similar to those customarily provided to the public provided the Government’s needs are satisfied; and
- Scope of the Government’s license rights will depend upon the nature of the computer software, the source of funding used for its development, and negotiations between the parties.

Within this broad framework, DOD IP policy, procedures and regulations are found at FAR Part 27, DFARS Part 227 and the associated contract clauses. DFARS 252.227-7014 governs the Government’s license rights in Noncommercial Computer Software. The Government’s license rights in Noncommercial Computer Software are divided into four (4) broad categories:

1. Unlimited Rights

This broad license allows the Government to use, duplicate, release, or disclose Computer Software for any purpose and to give it freely to others, including Government agencies and contractors. Disclosure for any purpose could include use by a recipient for a commercial purpose or for competing on a Government contract. Typically, Contractors grant Unlimited Rights to the Government in Computer Software developed exclusively with Government funds. Unlimited Rights are very close to ownership rights.

2. Government Purpose Rights

This type of license is similar to Unlimited Rights, except that the Government’s rights to use, duplicate, release and disclose the Computer Software are restricted to Government purposes only, which includes competitive procurement but excludes a recipient’s commercial purposes. Release outside the Government is conditioned upon prior written acknowledgement by the recipient of these restrictions.

3. Restricted Rights

This license in Computer Software restricts the Government's license rights to using the Computer Software on one computer at a time. When the Government receives a Restricted Rights license, the Computer Software can not be used by, or released or disclosed to, a third party Contractor, except in cases of emergency repair and overhaul or pursuant to a Service Contract calling for certain maintenance or service functions, and, in that circumstance, only if a non-disclosure agreement is signed, and the party furnishing the software is notified. Restricted Rights allows making a back-up copy of the Computer Software and transferring it to another Government agency if the transferor destroys their copy of the Computer Software.

4. Specifically Negotiated License Rights

The parties are encouraged to negotiate specifically negotiated license rights whenever the "standard" rights set out above do not meet their needs. The Government, however, may not accept less than Restricted Rights.

As noted previously, the foregoing relates to non-commercial computer software. Commercial software is handled a little differently, and may be obtained by the Government pursuant to the supplier's standard license terms, provided those terms meet the Government's needs. The typical Windows PC license is a good example of a commercial computer software license.

The regulatory provisions for Non-Commercial Technical Data are found at DFARS 252.227-7013 and are very similar to those outlined above for Computer Software, except that the term Limited Rights, having its own rights regime associated with it, is used instead of Restricted Rights.

The Point of Contact for this subject in the CECOM Legal Office is Mr. George Tereschuk, (732) 532-9795, DSN 992-9795.

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Is McKinney Still Applicable to DoD Leases?

Sec. 2812 of the National Defense Authorization Act For Fiscal Year 2001 may have subtly removed any statutory requirement that DoD agencies provide HUD with notification that property will be made available for leasing under 10 USC 2667.

Under the Stewart B. McKinney Homeless Assistance Act (42 USC 11411), agencies are required to identify to HUD any property or buildings that are “excess property or surplus property or that are described as unutilized or underutilized in surveys by the heads of landholding agencies under section 202(b)(2) of the Federal Property and Administrative Services Act of 1949 (~~40 U.S.C. 483~~ 40 USC 483(b)(2)).” 41 CFR 101-47.801 establishes the standards that executive agencies shall use in identifying unneeded federal property, and 45 CFR 12a.1 defines “excess,” “surplus,” “unutilized,” and “underutilized” property in the use of federal property to assist the homeless. Under both regulations, “excess property means any property under the control of any Federal executive agency that is not required for the agency's needs or the discharge of its responsibilities, as determined by the head of the agency pursuant to 40 U.S.C. 483.” “Surplus property means any excess real property not required by any Federal landholding agency for its needs or the discharge of its responsibilities, as determined by the Administrator of GSA.” “Unutilized property means an entire property or portion thereof, with or without improvements, not occupied for current program purposes for the accountable executive agency or occupied in caretaker status only” “Underutilized means an entire property or portion thereof, with or without improvements which is used only at irregular periods or intermittently by the accountable landholding agency for current program purposes of that agency, or which is used for current program purposes that can be satisfied with only a portion of the property.”

10 USC 2667 is the controlling statute that authorizes military departments to lease ~~its~~ property, ~~to~~ receive rent, and accept consideration in kind. Prior to enactment of the FY01 National Defense Authorization Act, 10 USC 2667(a) specified that the military departments could lease real or personal property that was “(1) under the control of that department; (2) not for the time needed for public use; and (3) not excess property, as defined by section 3 of the Federal Property and Administration Services Act of 1949 (40 U.S.C. 472).” ~~However,~~ Since property to be leased by DoD under 10 USC 2667 could not be excess (or surplus) property, the only statutory connection to mandatory reporting under 42 USC 11411 was that the all leased property would necessarily be considered “unutilized” or “not occupied for current program purposes” because 10 USC 2667 required the property to be “not for the time needed for public use”. Sec. 2812 of the FY01 Defense Authorization Act struck paragraph (a)(2) of 10 USC 2667 and therefore removed any pre-condition that all property leased by DoD be considered “not for the time needed for public use”. The Authorization Act left intact the conditions that the leased property be “(a)(1) under the control of that department; and (a)(2) not excess property...”. Eliminating the “not for the time needed for public use” condition could

arguably be said to have eliminated any statutory requirement that all leased property necessarily be described as “unutilized” or “underutilized”. Use of the property by the agency to generate revenue for maintenance, restoration, construction, facilities operation support at the installation and for the military department might now arguably be considered as being utilized “for program purposes”. Recognizing leasing of non-excess property as fulfilling a “program purpose” would bring leased property in line with the status of licenses, permits, and easements, which also allow non-agency use of the property and generation of revenue for the agency but require no mandatory McKinney notification. POC is Jerry Williams DSN 880 6598.

Patent Term Extension: What to do and what to avoid

By Hay Kyung Changⁱ

I. Introduction

As all patent practitioners know, under the Trade-Related Aspects of Intellectual Property Rights (TRIPs) of General Agreement on Trade & Tariffs (GATT), a great change was brought about to the term of an issued utility or plant patent. The old certainty of 17 years from the date of issue, no matter how long the pendency of the application, was replaced by a term that began on the issue date of the patent and ran for 20 years from the earliest effective filing date of the application that matured into the patent. The Uruguay Round Agreements Act (URAA)ⁱⁱ amended 35 U. S. C. 154 to reflect this change. True, as amended, 35 U. S. C. 154(b) contained provisions for extending the term of a patent for any of the following three reasons: interference delay, secrecy orders and a successful (from the applicant's point of view) appellate review by the Board of Patent Appeals and Interferences or a Federal court. Any allowable extension, however, was limited to a maximum of 5 years, required that the patent-in-question not be subject to a terminal disclaimer and was reduced by the period of time during which the applicant for patent did not act with due diligence, as determined by the Commissioner. URAA contained no remedy for lack of due diligence on the part of the Patent and Trademark Office. The Act was definitely intended to move the practitioner but not the examiner.

Then came the American Inventors Protection Act of 1999(AIPA)ⁱⁱⁱ which amended 35 U. S. C. 154(b) to bring more equity and balance to the reasons that can give rise to patent term extensions. Changes were made to 37 C.F.R. Chapter 1, Subchapter A, Part 1, Subpart F. Many of the reasons added by the AIPA deal with administrative delays occurring at the PTO. Further, there is no maximum limitation to the length of extension allowable. This removes the injustice of having one's patent term truncated due to reasons entirely outside of the applicant's or the practitioner's control. Also, gone are the requirements of no terminal disclaimer and the minimum appeal pendency of three years as criteria for patent term adjustment for a successfully appealed application. The allowed adjustment is an extension, subject to limitations, of the patent term by one (1) day for each day of delay caused by reasons listed in 35 U.S.C 154 (b)(1).

II. The American Inventors Protection Act of 1999

The patent term adjustment provisions of this Act came into effect as of May 29, 2000 and apply to all patents issuing from utility and plant applications, including continued prosecution applications, divisional and

continuation-in-part applications, filed on or after that date. During the prosecution of the application, the dates of various events, some of which may trigger an extension of the patent term or cause a reduction in the period of the extension, are kept track of by Patent Application Location and Monitoring (PALM), an automated patent application information system at the Patent and Trademark Office. Each patent issuing from a utility or plant application filed on or after May 29, 2000 has an indication of the patent term adjustment on the front page after the inventor or any assignee data. However, the practitioner's first encounter with a patent term adjustment occurs with the receipt of the Notice of Allowance and Issue Fee Due (PTOL-85). There, the initial adjustment will be notated in terms of 0 to any number of days. The final adjustment is calculated when the issue date of the patent is known and noted on the Issue Notification. Between the initial and final adjustments, the applicant has one opportunity to request reconsideration of the initial determination. After the patent issues, the patentee has thirty days after the date of issue to request reconsideration of the patent term adjustment. The only allowable ground for this after-issue reconsideration is that the patent was issued on a date (usually later) other than the issue date projected by the Notice of Allowance. Design applications and Requests for Continued Examination (RCE) of applications that were filed before May 29, 2000 are not eligible for patent term adjustment under the AIPA.

A. Reasons Giving Rise to Patent Term Extension:

- III. The USPTO fails to take required actions relative to an application within specified time limits. The required actions are:
 - IV. providing the initial Office Action on the merits, restriction or species election requirement or requirement for information within fourteen (14) months of filing or national stage entry date.
 - V. responding to a reply or appeal within four (4) months of the date the reply was filed or appeal taken.
 - VI. acting on the application within four (4) months after a decision by the Board of Patent Appeals and Interferences or a Federal court, which leaves at least one allowable claim in the application.
 - VII. issuing a patent within (4) months after payment of the issue fee and satisfaction of all outstanding requirements, whichever is later.
- VIII. The USPTO fails to issue a patent within three (3) years of the actual filing date of the application. But any time spent in continued examination requested by the applicant, any applicant-requested delays, interference proceedings, secrecy order or

appellate review either by BPAI or a Federal court does not count toward tolling this three (3)-year period.

- IX. Delays occurred due to interferences, secrecy order imposition or a successful appellate review.

Factors Limiting Patent Term Adjustment:

- 1) In cases of overlapping delays based on concurrent reasons, no extension is allowed beyond the actual number of days delayed. i.e. The numbers of delay days attributable to the multiple reasons are not cumulative.
- 2) No extension is allowed beyond the date set in a terminal disclaimer.
- 3) The adjustment period is reduced by the length of the time period during which applicant failed to engage in reasonable efforts- due diligence- to conclude prosecution of the application.

X. Do's and Don'ts for the Practitioner to Avoid Reduction in Patent Term Adjustment

A. Do:

- 1) Reply to any Office action within three (3) months from the mailing date of the action. The period for reply set in the Office action has no effect on the calculation of any patent term adjustment.
- 2) Use Express Mail or facsimile to file papers.
- 3) Submit a complete reply, addressing all aspects of the Office action.
- 4) Submit any amendment or paper well in advance of one (1) month before an Office action or notice of allowance that requires the mailing of a supplemental Office action or notice of allowance.
- 5) If a provisional application has been filed, then file a non-provisional application that claim benefit of the provisional application, rather than converting the provisional to a non-provisional.
- 6) Frequently check the Patent Application Location and Monitoring (PALM) system to assure that submitted papers are accorded proper dates.
- 7) Carefully check any initial patent term adjustment and, if necessary, file a request for reconsideration with or before payment of the issue fee, stating the correct adjustment, the bases for the adjustment, yes or no terminal disclaimer and any pertinent statement regarding applicant's failure to engage in reasonable efforts to conclude prosecution.
- 8) Request reinstatement of any period reduced due to failure to reply within three (3) months. Show, to the satisfaction of the Commissioner, that the failure occurred "in spite of all due care."

- 9) File a request for reconsideration within thirty (30) days of patent issue to correct an erroneous patent term adjustment appearing on the patent.
- 10) File a civil suit under 35 U.S.C.154 (b)(4)(A) against the Director in the United States District Court for the District of Columbia within 180 days after the patent issue if dissatisfied with the patent term adjustment determination.

B. Don't:

- 1) Request suspension of action or deferral of issuance of a patent unless necessary.
- 2) Abandon the application.
- 3) Fail to file a timely petition to withdraw an improper holding of abandonment.
- 4) Convert a provisional to a non-provisional application.
- 5) Submit a supplemental reply or paper unless requested by the Examiner
- 6) Submit an amendment after a notice of allowance.
- 7) Count on the date of the certificate of mailing to be used in calculating the patent term adjustment. The date of receipt at the PTO is used for the calculation.

IV Conclusion

The American Inventors Protection Act of 1999 placed on the PTO the requirement for more predictable and prompt service to the inventor, thereby ameliorating the potentially term-shortening effect of the Uruguay Round Agreements Act. There are quantifiable consequences, in the form of patent term adjustments, to the PTO's failures to act on a pending application within specified times. However, due to the reductions to patent term adjustment that can arise from lack of due diligence on the part of the applicant, the practitioner has to be ever more vigilant during the prosecution of an application if he/she is to provide fully competent service to the applicant and not suffer the loss of any part of the life of the issued patent.

The path to the final determination of term adjustment may at times be torturous which makes it imperative that the practitioner monitor closely the various events and their dates during the pendency of an application.

ⁱ The author is a patent attorney with the U. S. Army Aviation and Missile Command at the Redstone Arsenal, Alabama. The opinions expressed herein are those of the author and not necessarily those of the Department of Defense, Department of the Army, the Army Materiel Command or the Army Aviation and Missile Command.

ⁱⁱ Public Law 103-465 (December 8, 1994).

ⁱⁱⁱ Public Law 106-113 (November 29, 1999).

Some Practical Guidance for Contracting Officers Regarding End-Use Certificates

By Kenneth J. Hanko, TACOM-ARDEC Legal Office

This paper will address the concept of an end-use certificate ("EUC"). It will also provide some practical guidance for contracting officers in dealing with a commonly encountered scenario concerning EUCs.

For a number of years, the United States has required foreign purchasers of armaments and other equipment on the U.S. Munitions List to provide assurances against third party transfer and certain uses without the consent of the United States Government ("USG"). These are commonly referred to as EUCs. The International Traffic in Arms Regulations ("ITARs") (which contains the U.S. Munitions List), requires the execution of a "nontransfer and use certificate", Form DSP-83, which requires the foreign end-user to agree that it will not reexport, resell or otherwise transfer the technical data, defense article of military equipment which it has received from the USG. See, 22 C.F.R section 123.10, In the Foreign Military Sales context, similar assurances are included in the terms and conditions of the LOA. Direct commercial sales require an authorized representative of a foreign country to provide comparable assurances in the form of a separate EUC.

Frequently, during the course of an acquisition, foreign countries request the contracting officer to sign EUCs for defense products purchased by DoD from their countries. DFARS 225.802 -71, *End user certificates*, provides the following guidance:

Contracting officers considering the purchase of an item from a foreign source may encounter a request for the signing of a certificate to the effect that the Armed Forces of the United States is the end user of the equipment, and that it will not be transferred to third parties without authorization from the Government of the country selling the item. When encountering this situation, refer to DoD Directive 2040.3, End User Certificates, for guidance.

In a 9 April 1991 memorandum, the Deputy SECDEF established a policy addressing EUCs, which was later incorporated in DoD Directive 2040.3. That Directive defines an EUC as a written agreement in connection with the transfer of military equipment or technical data to the USG that restricts the use or transfer of that item by the USG. It also sets forth levels of approval at the DA and DOD levels. (DOD Dir 2040.2, para.3.1). One of the policy reasons underlying the requirement for senior level approval is that agreement to an EUC, in effect, impinges on the sovereignty of the USG and potentially restricts the US's ability to honor worldwide security arrangements to allied and friendly countries. Agreement to an EUC may also contravene established international agreements that recognized permissible use of items for "defense purposes". The Directive, at para 4.3 creates three categories of EUC with differing levels of approval, as follows:

Category I. Secretaries of the Military Departments and Directors of Defense

Agencies may authorize EUCs:

- For acquisition of items classified for security purposes by a foreign government,
- For the acquisition of items covered by the nonproliferation agreements to which the United States is a party, such as missile technology, or
- That permit the item to be "used for defense purposes" . . . by the United States.

Category II. EUCs that are not Category I or III are Category II. Secretaries of the Military Departments and Directors of Defense Agencies may authorize Category II EUCs only after a determination is made through the coordination procedures set forth in subsection 6.1.2., below, that, notwithstanding the use or transfer limitations, the purchase is in the U.S. national interest. The least restrictive provisions possible should be negotiated.

Category III. Secretaries of Military Departments and Directors of Defense Agencies may not authorize the signature of EUCs that limit the right:

- For use by or for the U.S. Government in any part of the world, or
- To provide the item to allies engaged together with the United in armed conflict with a common enemy.

Waivers to this prohibition may be granted by the Under Secretary of Defense (Acquisition) (USD(A)).

Acquisition Letter number 92-3 dated April 30, 1992, sets forth approval authority levels within the Department of the Army. The authority to execute Category I or II EUCs has been delegated to the Army Acquisition Executive ("AAE"). The authority to sign subsequent EUCs on the same procurement will be delegated by the AAE to the contracting officer after the AAE executes the initial EUC. The authority to execute Category III EUCs resides with the Secretary of the Army, after receiving a formal waiver from the Under Secretary of Defense (Acquisition). All requests for execution of an EUC should include the proposed EUC language and all pertinent information concerning the item and the acquisition.

When a contracting officer is faced with a request to sign an EUC, the first step should be to analyze the request to determine if it is truly an "EUC" that fits within the definition of the DOD Directive. One typical scenario is the submission of the certificate of the foreign government labeled "End Use Certificate" or words to that effect, and containing language that the item is to be used by the USG only for 'defense purposes'.

This is typically the case when dealing with the Swedish government. Swedish companies are firm in their insistence that the certificate, in its unaltered form, must be signed in order for the acquisition to be accomplished. In this scenario the contracting officer does not have much choice and the procedures of DOD Directive will need to be followed. A contracting officer's determination and findings, which addresses all of the circumstances of the acquisition, should be prepared and the request for authority to sign an EUC should be sent to the AAE.

However, if the analysis reveals the foreign company's request is in the nature of a general request for an "end use" certificate or statement, the contracting officer should determine exactly what is being requested by the foreign supplier: i.e. does it truly fit the definition of an "end use restriction" within the terms of DOD Directive 2040.3?. For example, does it contain any limitations or restriction on the USG's use of the item, either in CONUS or OCONUS? Does it limit the USG's use of the item only for "defense purposes? Sometimes foreign companies misuse the term "end use certificate" when all they really require is a statement of what will be done with the item. In this instance, the contracting officer should be advised to seek clarification of the request. Frequently, the company will agree to accept a statement by the contracting officer that merely recites what is being done with the item. For example, one foreign company agreed to accept a statement such as: "It is hereby certified that the 3500 pounds of X, being purchased from ABC Foreign Co. to be delivered to Picatinny Arsenal, NJ USA under contract 123456 will be used by the U.S Government and its contractors." This is merely a factual statement of what is transpiring during the acquisition. Note, that there is no language

limiting or restricting the USG's use of the item. Obviously, any statement the contracting officer signs should not contain the phrase "end-use certificate" or any similar phraseology.

This latter method of working with the contracting officer and the foreign company to clarify the exact nature of their request for an "end-use" certificate, if successful, has the salutary effect of avoiding a delay in the acquisition and streamlining the process.

HANDLING POST-AWARD PROBLEMS

As we all know, the primary mission of Team C4IEWS is the acquisition of command, control, communications, intelligence, and electronic warfare equipment. Although it is important to timely award a contract, once the contract has been awarded, it is equally important to assure that the item or service contracted for reaches the ultimate user in a timely manner and in accordance with the contract requirements. This is the world of contract administration.

This article will address some of the post-award problems that those in the Government, but more specifically those individuals involved in the acquisition process, may face.

Many times, once the contract is awarded, the Administrative Contracting Officer (ACO) performs the hands-on function of administering the contract, making sure that the contractor complies with the terms and conditions of the contract. The Procuring Contracting Officer, however, never totally “bows out” of the picture.

Some of the most common types of post-award problems likely to be encountered in a fixed-price production contract are constructive changes, delays in contract performance, and acceptance of non-compliant items.

Any Government conduct that causes the contractor’s costs of performance to increase can entitle the contractor to an increase in the contract price, either through an equitable adjustment or “constructive change” theory. The constructive change approach is based on the concept that whatever Government conduct (delay, delivery of late or defective Government Furnished Material, etc.) caused the increased costs is “constructively” equivalent to a formal change issued by a Contracting Officer under the “Changes Clause”, FAR 52.243. The “equitable adjustment” approach is not tied directly to a contractual clause, but rather is based on the theory that fundamental fairness requires that a contractor be reimbursed for financial impact caused by Government actions. In either case, the contractor must provide the Contracting Officer with sufficient information to demonstrate two things: “entitlement” (that is, what facts support its contention that the Government is responsible for the increased costs) and “quantum” (that is, the auditable data supporting the amount claimed). The Government should always be willing to pay its contractors what they are entitled to, but often the parties cannot agree as to whether entitlement or quantum have been adequately demonstrated. This may result in a dispute.

After discussion, if the Government and the contractor continue to disagree on a mutually acceptable resolution of the matter, the Contracting Officer should issue a timely final decision letter setting forth the reasons why the Government rejected, in whole or in part, the contractor’s position. For claims of \$50,000 or under, the Contracting Officer shall issue a decision letter within 60 days. For certified claims over \$50,000, the Contracting Officer shall issue his or her decision within 60 days or notify the contractor of a reasonable time in which a decision will be rendered. Additionally, the letter should set forth the procedures by which the contractor may appeal the Contracting Officer’s final decision.

Under the Contract Disputes Act of 1978, the contractor has two avenues of appeal. A contractor can appeal within 90 days of receipt of the final decision to the Armed Services Board of Contract Appeals (ASBCA) or within 12 months to the U.S. Court of Federal Claims. Of course, at any stage in the process, the parties can mutually agree to use Alternative Dispute Resolution techniques to resolve the dispute.

Sometimes the contractor fails to deliver; hence the contractor has defaulted on its contract with the Government. Contractor defaults are governed by the “Default (Fixed Price Supply and Service)” Clause, FAR 52.249-8 for fixed-price production contracts. The default clause is the ultimate method of dealing with the contractor’s unexcused present or prospective failure to perform in accordance with the contract specifications or delivery schedule.

The standard default clause sets forth three different grounds for terminating a contract:

- 1) failure to deliver the product or complete the work or service within the stated time;
- 2) failure to make progress so as to endanger performance of the contract; or 3) breach of any other contract provision.

Typically, before the Government terminates a contract, the Contracting Officer will issue either a Cure Notice or a Show Cause Letter to ascertain why the contract should not be terminated for default. Normally, a Show Cause Letter is utilized in cases where a contractor has failed to make a scheduled delivery and assists the Contracting Officer in determining whether the contractor’s failure to deliver was beyond its control. (Note that certain excuses, such as a sub-contractor’s failure to perform, are deemed *not* to be beyond the prime contractor’s control.) Use of a Show Cause Letter is not a mandatory pre-requisite to termination based on a failure to deliver, but it is the much better practice.

Default termination based on anything other than a failure to deliver *must* be preceded by a “Cure Notice”. This is a written notification of the condition(s) giving rise to the default, a direction as to what must be done to cure that condition(s), and which allots at least 10 days in which to do so. Decisions to terminate for default are appealable to either the ASBCA or U.S. Court of Federal Claims as outlined above.

An alternative to termination, if it would be in the Government’s best interests, would be to revise the delivery schedule (in the case of a failure to deliver) or relax the contract requirements in some way so as to address whatever issue gave rise to the Show Cause Letter or Cure Notice. In either case, those actions should be accomplished by bilateral modification, and the Government should require adequate consideration (such as a downward adjustment in the contract price, additional units, accelerated deliveries, etc.) in return for its willingness to forgo its right to terminate.

It can’t be overemphasized that, whenever a post-award issue is negotiated to resolution, whether it be a claim for increased costs or a possible default termination situation, that

resolution should be made part of a bilateral modification to the contract that contains appropriate release language that absolves the Government and all of its personnel involved in the action from any future liability for the subject matter. Without such language, the deal the Contracting Officer thought was going to be the last word on the issue could turn out to be just the first chapter in a long, time consuming and costly fight.

The last post-award problem to be discussed is the situation where the Government accepts an item and it doesn't perform as expected. FAR 46.501 states that "[a]cceptance constitutes acknowledgement that the supplies or services conform with applicable contract quality and quantity requirements . . ." Nevertheless, there are certain circumstances when acceptance is not final.

The Government's right to revoke acceptance falls into three main categories: latent defects (those that are not discoverable by reasonable inspection); fraud or gross mistake amounting to fraud.

A review of the case law in this area shows that revocation of acceptance is, although not impossible, extremely difficult absent very clear facts in the Government's favor. In a situation where the defective condition is such that the only inspection that would have revealed it would have destroyed the items, the Government may be able to successfully revoke its acceptance. Similarly, evidence of intentional concealment by the contractor would allow for revocation of acceptance (and perhaps criminal prosecution or debarment).

The most important points to take away from this discussion are that our responsibilities don't end with the award of the contract. Good communication within the Government and between it and the contractor through the application of effective "Partnering" processes will avoid many post-award problems. When they can't be avoided, however, the Legal Office can help the Contracting Officer get to a resolution that will be both fair and final.

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Impact of DA Policy on Commercial Items

In a memorandum dated 5 January 2001, issued by the Under Secretary of Defense for Acquisition and Technology, a Department of Defense (DoD) review found inconsistent commercial item determinations and weak market research among the obstacles that exist to broadening the use of commercial items within the DoD.

By memorandum dated 26 March 2001, Subject: Commercial Acquisitions, the Acting Assistant Secretary of the Army (Acquisition, Logistics and Technology) issued an Implementation Plan for Increasing the Use of FAR Part 12. It announced a policy that all services (with the exception of services under FAR Part 36) were presumed to be commercial and that FAR Part 12 policies and procedures would be used to buy these services. It further stated, “for those services where the results of market research indicate that the service is not commercial, the local Competition Advocate must approve the commercial determination.”

The Federal Acquisition Streamlining Act (FASA) of 1994 (Section 8104, paragraph 2377 of Public Law 103-355), requires that the head of an agency use the results of market research to determine whether there are commercial items or, to the extent that commercial items suitable to meet the agency’s needs are not available, non-developmental items (NDIs) that meet the agency’s requirements or could meet the agency’s requirements if those requirements were modified to a reasonable extent.

FAR Part 10 requires that agencies conduct market research appropriate to the circumstances before developing new requirements documents for an acquisition by that agency. If market research establishes that a commercial item cannot fill the Government’s need, agencies are required (FAR 10.002 (c)) to reevaluate the requirement for possible restatement to enable use of commercial or NDIs, as defined in FAR 2.101. The findings of the market research must be documented (FAR 10.002 (e)).

Issue: For those services where the results of market research indicate that the service is not commercial, approval from the local Competition Advocate must be obtained before the acquisition can be processed as a non-FAR Part 12 acquisition.

Discussion: In those instances when market research indicates that a commercial service that will satisfy the Government’s needs is not available, documentation of the commerciality decision, in the form of a Market Research Summary Document, must be sent to the Competition Advocate for approval.

The Market Research Summary Document can be prepared using the format and content guidance provided during the AMC sponsored training in June 2000 to help acquisition personnel in conducting market research and documenting the research findings for use in acquisition planning. This documentation should address the methods used to conduct market research, the data gathered throughout the research process, current market conditions, and finally a conclusion

as to whether or not a commercial item, or service, or a NDI, is available that will satisfy the Government's needs. If a commercial item or service or NDI is not available, the Market Research Summary Document should further include a discussion on actions taken to re-evaluate the requirement for possible restatement to enable use of commercial type items or services, or a justification for the decision to procure other than a commercial item or service, or NDI.

Issue: The Army procures many of the services it requires using cost or time and materials type contracts. That common practice is inconsistent with the newly created presumption that all services are commercial, and the FAR Part 12 procedures which only permit the use of firm-fixed-price (FFP) or fixed price with economic price adjustment (FP/EPA) type contracts for commercial acquisitions.

Discussion: FASA mandates that the FAR include a requirement that FFP or FP/EPA contracts be used to the maximum extent practicable for acquisitions of commercial items, and that cost type contracts be prohibited. (FASA Section 8002 (d) and FAC 90-32.) However, the FAR implementation of that statutory requirement is significantly more restrictive. FAR 12.207 provides that:

“Agencies shall use firm-fixed-price contracts or fixed-price contracts with economic price adjustment for the acquisition of commercial items. Indefinite-delivery contracts (see Subpart 16.5) may be used where the prices are established based on a firm-fixed-price or fixed-price with economic price adjustment. Use of any other contract type to acquire commercial items is prohibited.”

The FAR provision eliminates the flexibility that the “maximum extent practicable” statutory language provided, and imposes a complete prohibition on the use of any contract type other than FFP or FP/EPA for the acquisition of commercial services.

Legislative relief and/or changes through the FAR Council or Re-Invention Laboratories will be needed to enable continued use of cost and T&M type contracts for commercial services. Absent such measures, use of these types of contracts will be prohibited unless the appropriate Competition Advocate approves the determination that the services required are not commercial. To implement FAR Part 12 for commercial services, a widespread cultural change coupled with a major training effort will need to occur quickly both within the Government and industry community, so that FFP or FP/EPA type contracts can be used effectively for service acquisitions.

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ARMY PILOT PROGRAM RECOMPETED

The mid 1990s presented the DoD research community with a unique set of circumstances, the Defense budget was being significantly reduced, while breakthroughs in various technologies offered opportunities for improving American warfighting capabilities. The Army Research Laboratory (ARL) attempted to address this situation with the implementation of the Federated Laboratory (Fed Lab) Program. The goal of Fed Lab was to establish a collaborative research environment bringing together the best researchers from academia, industry and the government. The program was designed to focus on those technologies where the critical mass of expertise resided outside of the Government. These technologies included sensors, displays, software and intelligent systems, telecommunications, and distributed simulations. Fed Lab strategy called for the establishment of a collaborative research environment in each of these technical areas. The legal authority employed to implement the program was Cooperative Agreements (31 USC 6305, Using Cooperative Agreements). This authority was selected because of the flexibility it provides, the inherent public purpose benefit of basic research, and the need for substantial involvement on the part of the Government. As a result of continuing budget reductions, awards were made in only three of the original five technical areas. To be eligible for a Fed Lab award offerors were required to form consortia comprised of, at a minimum, an industrial lead, a major university, and an Historically Black College or University, or a Minority Institution (HBCU/MI). Over the five-year period of performance, the program generated numerous technical papers, personnel rotational assignments, as well as other technical achievements and demonstrations. The program was deemed a significant success and was just recently recompeted and expanded in 2001. This article discusses the lessons learned, and details the arduous process of implementing the successor to Fed Lab, the Collaborative Technology Alliances (CTA) Program.

While Fed Lab was considered a significant success, there were aspects of the program that warranted improvement. These aspects included the emerging need for appropriate mechanisms to facilitate transition of research results to specific Army applications, the relatively untapped involvement of other government agencies (OGAs) and a period of performance that would provide ample time to fully exploit the relationships formed and the research potential of the Program.

Successful Fed Lab offerors were awarded cooperative agreements, which are very similar to grants, except for the degree of Government involvement. Like a grant, a cooperative agreement does not provide for profit or fee. As a result, experience showed that successful Fed Lab offerors were somewhat reluctant to transition research results to Army applications while performing under the cooperative agreement. In fact, since the transition effort is designed to meet specific Army needs, they are more appropriately performed under a procurement contract (31 USC 6303, Using Procurement Contracts). Consequently, as Fed Lab matured, a number of separate, sole source procurement contracts had to be awarded to facilitate technology transfer efforts. The CTA competition provided for the award of a cooperative agreement to the consortium as a whole, for the basic research effort. The CTA competition also provided for the

award of a procurement contract to the consortium lead for the technology transition effort. Under the technology transition contracts the other consortium members may perform as subcontractors as appropriate. A single CTA proposal and evaluation addressed both efforts, with award of both instruments resulting from a single proposal. One award made (with both instruments) for each technical area.

The Fed Lab program provided a collaborative research environment that included the Army Research Laboratory (ARL), industry and academia. Most, if not all of the Fed Lab research requirements were dictated by ARL and the consortia members. In order to maximize the benefits to the Government from the effort needed to solicit a program of this magnitude it was determined early on to invite input from other government agencies. A number of DoD and other Federal organizations accepted the invitation and provided input to the CTA Program. Their input included the addition of specific technical areas of interest as well serving as evaluators of the proposals.

Congressional language limited the Fed Lab period of performance to five years. This was unfortunate because the formation of consortia requires a considerable period of time. In addition, since the average Fed Lab consortia had ten members there was a considerable familiarization process both within the consortium as well with Government researchers. Time was needed to develop these relationships and maximize their benefits in the collaborative research environment. As a result CTA was established with a base period of performance of five years with a single three year option period. This structure provides the awardee an incentive to excel as well as maximizes the benefits of forming a successful consortium.

Once Departmental support for CTA was confirmed, the solicitation process began in earnest. The success of Fed Lab led to the expansion of the program from three technical areas to five. The five areas are Power and Energy, Advanced Decision Architectures, Communications and Networks, Robotics, and Advanced Sensors. A team comprised of a contracting/grants officer, business law attorney and technical staff was assembled to begin work on the solicitation documents. The team decided to take an uncharacteristic "open" approach to the solicitation process. A draft solicitation or program announcement including a description of the technical areas of interest, evaluation criteria, and sample award documents were posted on the CTA webpage in mid-May 2000. The posting of the program announcement was shortly followed by an Opportunity Conference that was hosted at ARL in June 2000. The purpose of the conference was to provide potential offerors a forum in which to raise questions and network with potential consortium members. Conference presentations included a contractual and legal overview as well as technical discussions. The comment period for the draft program announcement resulted in insignificant changes to the announcement and the final version was issued in early August 2000. In mid-August 2000, ARL hosted an open house where potential offerors could familiarize themselves with ARL research interests, facilities and capabilities as well as network with potential partners. Proposals were due in November 2000.

The CTA program announcement was unique in that it represented one of the first times that a single solicitation would result in the award of two distinct instruments, namely a contract and a cooperative agreement. As a result, a complex evaluation scheme was designed that was broken down into distinct areas for the research portion, technology transition, program management and cost. Within the research portion, each of either 3 or 4 technical areas were evaluated using evaluation factors that included technical merit, credentials, facilities, dual use potential relevance and intra-alliance linkage. The technology transition factors included a plan to execute the technology transition program, past performance, a response to a sample task, and small business outreach. The management factors included articles of collaboration, program management, and collaboration. The program announcement included a budget for the research component, and offerors were directed to propose within the budget. Further, offerors were informed that the technology transition contract would have a ceiling of \$60M, and offerors were requested to propose appropriate labor categories that would be used to issue task orders on a time & materials basis. As a result, the cost proposal was evaluated for cost reasonableness, realism and affordability. Offeror cost share was encouraged, but not required. Cost share impacted the evaluation only if it provided improvements to the research, management, or technology transition areas. The program announcement included a chart giving the specific weights for all of the factors within a research alliance. A sample chart is provided below:

The CTA program announcement resulted in the submission of twenty-one proposals. Each of the research areas generated adequate competition. The twenty-one proposals included over two hundred and forty (240) separate entities. Consortia membership ranged from eight to over twenty members. It is important to note that it is not uncommon when a proposal includes multiple commercial entities that the parties are oftentimes reluctant to share their proprietary cost information. As a result a single proposal might include multiple, separate cost proposals all submitted under separate cover. As a result the contracts and administrative staff must be ever vigilant to understand the complete proposal and ensure that all elements of the proposal have been submitted, cataloged, and properly evaluated.

The CTA evaluation process reflected the formal source selection process. A Source Selection Evaluation Board (SSEB) comprised of nearly seventy government employees were first briefed on the evaluation process, identities of the offerors, and conflict of interest considerations. From that time forward each proposal was assigned an alpha-numeric code which was used for all future discussions and documentation of the evaluation results. Individual evaluators were assigned specific evaluation factors. Each evaluator assigned a score from one to ten for each factor. Once the individual evaluators completed their individual evaluation they met in predetermined groups to come to a consensus score for each factor. If an evaluator scored a factor within a research, management, or technology transition area, then he or she had to score the same factor on all other proposals within that research area. If the score of an individual evaluator was more than 2 points from the agreed to consensus score, the evaluator was required to document how he or she came to agree with the consensus score. A minimum of three evaluators scored each factor. The evaluation results were reviewed by a team comprised of the grants/contracting officer, legal counsel, and the SSEB chairman. Review by this team focused on ensuring that the evaluation documentation was prepared in accordance with the Source Selection Evaluation Plan (SSEP) and was thorough and defensible. The evaluation results were then reduced to a briefing that was presented to the Source Selection Advisory Council (SSAC). The SSAC was comprised of high ranking personnel from the Army research and development community. The SSAC briefing, with the SSAC recommendations added, was then presented to the Source Selection Authority (SSA). The SSA briefing resulted in the approval of the competitive range for each research area. Those offerors determined not to have a reasonable chance of being selected for award (and therefore not included in the competitive range) were notified of such and were offered an opportunity for a debriefing after awards were made under the CTA program. The decision to defer the debriefings until after award was based on the fact that many of the offerors were members of multiple teams in various technical areas, and it was felt that debriefs prior to award might provide an unfair advantage to some consortia. During the SSA briefing it was determined that site visits would be conducted for each proposal in the competitive range.

Site Visits were conducted in order to facilitate meaningful discussions for each proposal. In order to maximize the benefits of the site visits, each offeror was given a matrix that provided the offeror with information concerning the evaluation of their proposal. This matrix indicated whether the offeror did not meet, met, or exceeded the government requirements for each

evaluation factor. In addition, many of the factors also had brief narratives that articulated the basis for the factor score, listing notable strengths and weaknesses. These matrices also included clarification questions for each offeror concerning their proposal. The matrices were provided to the offeror at least one week prior to the site visit. An attempt was made to schedule the site visits within each research area as close as possible, so that each offeror had relatively the same amount of time to prepare for the site visit. Offerors were notified that the Government team would not take away any materials from the site visit. Offerors were informed that shortly after their site visit they would be provided an opportunity to submit a thirty page Final Proposal Revision (FPR) which would be used, as a complement to the initial proposal, for the final evaluation. In the interest of fairness, each site visit was limited to four hours, and was attended by a core team consisting of the grants/contracting officer, legal counsel, SSEB chairman, and an administrative assistant. This core team was complemented with technical experts familiar with the Government's evaluation for each factor. Each offeror within a research area was visited by the same Government team. Each site visit began with a brief discussion of the ground rules and a discussion of cost and contracting issues. Once these matters had been addressed, the offeror was allowed to proceed as they desired. Each offeror was encouraged to use the time at the site visit to discuss the Government's evaluation and ask the Government site visit team clarification questions. This ensured that each offeror understood the Government's evaluation of its proposal, and could make any changes it deemed appropriate in the FPR. It should be noted that there were several offerors who were included in the competitive range that needed to make significant improvements to their proposals in order to have a chance to receive award. Those offerors were informed of such at the site visit, and were advised that it was their decision as to whether to continue in competition and submit an FPR.

The evaluation of the FPRs was conducted using the same criteria and procedures as with the evaluation of the initial proposals. Again, the evaluation materials were distilled to the requisite award decision briefing for the SSAC and the SSA. The team that compiled the award decision briefing was advised to consider the debriefing process, thereby minimizing the need for duplicate efforts. The awardees were selected and awards made in June 2001. It was not until the awardees had been selected that their identities were revealed to the SSAC and SSA. All offerors were afforded an opportunity for a face-to-face debriefing.

Since the SSA briefing was produced with the debriefings in mind, only minor editing of the results of the evaluation (to delete numerical scores, etc.) was necessary to prepare the bulk of the debriefing. Once again a core team of the grants/contracting officer, counsel, administrative assistant, and the requisite technical experts attended each debrief. ARL relied heavily on the AMC Debriefing Guide in preparing for the debriefings. Each debrief was limited to no more than two hours. The debriefings began with a discussion of the ground rules for the debriefing. This was followed by an in-depth discussion of the evaluation process so as to ensure each offeror that they had been treated fairly and that the Government had followed the evaluation process described in the solicitation. Technical discussions focused generally on a single slide representing a summary of the evaluation of the offerors proposal. Below is a sample of the single slide for a research program with three technical areas (TA1, TA2, and TA3). Although

each factor was given a numerical score for the purposes of this chart the scores were translated into colors. Red reflected a score that failed to meet the government requirements (scores 0-4), yellow reflected a score that met the government requirement (scores 5 and 6), and green reflected a score that exceeded the government requirement (scores 7-10). This particular chart provided an excellent roadmap for the technical discussions, and was readily understood by all attendees.



FPR DISCUSSION & SUGGESTIONS FOR IMPROVEMENT



F I N A L S C O R E S			
F A C T O R	T A 1	T A 2	T A 3
A	Green	Yellow	Green
B	Green	Green	Yellow
C	Green	Green	Green
D	Green	Green	Green
E	Yellow	Green	Yellow
F	Yellow	Yellow	Yellow
G	Green		
H	Green		
I	Yellow		
J	Green		
K	Green		
L	Green		
M	Green		
O R I G I N A L S C O R E S			
F A C T O R	T A 1	T A 2	T A 3
A	Green	Yellow	Green
B	Yellow	Yellow	Red
C	Green	Green	Green
D	Green	Green	Yellow
E	Yellow	Red	Red
F	Yellow	Red	Red
G	Yellow		
H	Yellow		
I	Red		
J	Green		
K	Red		
L	Green		
M	Green		

In conclusion, the CTA competition was a grueling but rewarding experience. The process did not result in a single protest or even the hint of one. Many of the debrief attendees complemented ARL on their professionalism and appreciated the extra effort expended to ensure that all offerors were treated fairly. To date CTA has proceeded with only minor growing pains, but the effort to involve other government agencies has proven to be successful. In addition, the core staff responsible for implementing CTA have fielded numerous inquiries from other government agencies interested in establishing similar programs in other research areas.

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TTY (202) 663-4494

Joint Statement Against Employment Discrimination in the Aftermath of the September 11 Terrorist Attacks

Since the September 11 terrorist attacks, we have seen compassion and respect for people of all faiths, races, and national and ethnic origins in workplaces throughout our country. One month after the attacks, President Bush noted with gratitude this "outpouring of compassion for people within our own country," recognizing that individuals of many religions stand side-by-side in America.

Nonetheless, we continue to receive reports of incidents of harassment, discrimination, and violence in the workplace against individuals who are, or are perceived to be, Arab, Muslim, Middle Eastern, South Asian, or Sikh. When people are singled out for unfair treatment or are harassed based on their national origin, immigration status, ethnicity, or religious affiliation, practices, or manner of dress, we must act quickly to address and redress these acts of discrimination.

As leaders within the principal federal agencies responsible for enforcing the laws against discrimination in employment, we are issuing this joint statement to reaffirm the federal government's commitment to the civil rights of all working people in our fight against terrorism. These agencies - the Equal Employment Opportunity Commission, the Civil Rights Division of the Department of Justice, and the Office of Federal Contract Compliance Programs of the Department of Labor - together continue to intensify their efforts to combat discrimination based on religion, ethnicity, national origin, or immigration status in the workplace.

To that end, we are encouraging victims to come forward so that we can promptly investigate their complaints. The aftermath of September 11 has demonstrated the need for our agencies to make extensive and wide-ranging efforts to provide public education, information, and guidance. We have instructed those who work in our agencies to take prompt and appropriate action in response to complaints of employment discrimination relating to the events of September 11 and

the ongoing fight against terrorism. We are committed to taking all necessary action to protect the civil rights of all of our working people.

The first step is preventing discrimination before it occurs. Many employers, labor organizations, and employee groups have taken swift action already. We commend those who have sent out the message that discrimination and harassment will not be tolerated in their workplaces, and urge all employers to communicate and enforce workplace policies against harassment, discrimination, and retaliation. Employers also should encourage employees to report any improper conduct through internal complaint mechanisms or to appropriate federal agencies. Additionally, we ask those employers who have been charged with discrimination to resolve these matters voluntarily in cooperation with our agencies.

These efforts are of vital importance to individuals of all races, ethnicities, national origins, and religions in workplaces throughout the country. In the President's words, that which "makes our nation so strong and that will ultimately defeat terrorist activity is our willingness to tolerate people of different faiths, different opinions, different colors, within the fabric of our society." It is this diversity and inclusiveness that strengthens our country and guarantees our future prosperity. Together we can make our workplaces models of respect and understanding. And in this way we do our part to defeat those forces that seek to undermine the American way of life. Individuals who wish to file a complaint of employment discrimination should call the Equal Employment Opportunity Commission at 1-800-669-4000 (allegations involving employers of fifteen or more employees); the Department of Justice's Office of Special Counsel Worker Hotline at 1-800-255-7688 (national origin allegations against employers with four to fourteen employees and citizenship or immigration status allegations against all employers); or the Office of Federal Contract Compliance Programs at 1-888-376-3227 (allegations against federal government contractors).

_____/s/_____
Cari M. Dominguez

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U.S. Equal Employment
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U.S. Department of Labor

THE SOLDIERS' AND SAILORS' CIVIL RELIEF ACT

The Soldiers' and Sailors' Civil Relief Act (SSCRA) is a federal statute (50 U.S.C. app. §§ 500-591), that allows military personnel, and sometimes military dependents, to postpone or suspend some civil obligations so they can devote their energy and attention to the defense needs of the Nation. This article is intended to provide general information about portions of the SSCRA that many of our clients may come into contact with, but is not a substitute for seeing an attorney. If you think your situation involves a protection under the SSCRA, see an attorney for a more detailed discussion about your rights and responsibilities.

GENERAL PROVISIONS

Persons Protected

Active duty members are covered by the SSCRA. Reservists are covered while on annual training, but are not covered while on inactive duty training. National Guard members are covered only if in active federal service (Title 10 Status). State National Guard personnel on full-time state duty are not covered by the SSCRA, and must look to similar state statutes for protection. Military dependents are covered in certain situations (see below).

Period of Coverage

Reservists are sometimes protected as of the date they receive orders, but will most often be protected as of the date they report for duty. Ordinarily, the date of discharge terminates all coverage. Some important protections, however, extend for a limited time beyond discharge, but are directly tied to the discharge date.

PROTECTION FOR PRE-SERVICE OBLIGATIONS

There are four primary areas in which the SSCRA affords protection to military members when dealing with obligations incurred prior to entry on active duty.

Termination of Leases

A service member may terminate any lease covering premises used for dwelling, professional, business, agricultural or similar purposes if the lease was entered into prior to entry on active duty, and the military member or his/her dependents used the property for one of the designated purposes. The termination must be in writing, and must be delivered to the landlord. For a month-to-month lease, termination is effective 30 days after the first date on which rent is due after notice is given. In other cases, termination is effective on the last day of the month following the month in which notice is given.

Interest on Credit Obligations

With the exception of government student loans, any credit obligation incurred prior to entry on active duty is eligible for a statutory reduction in the interest rate to 6% per annum. The creditor must reduce the interest rate to 6% for the period of military service unless the creditor can prove in court that the member's ability to pay the higher interest rate is not "materially affected" by his/her military service.

Installment Contracts

If a military member entered into an installment contract for the purchase of real or personal property before entering active duty, and paid a deposit or installment on the contract, the creditor cannot exercise any right or option to rescind or terminate the contract or resume possession of the property because of non-payment or other breach, except by court order. In order to gain the protection of this provision, the member must prove his/her military service "materially affected" his/her ability to pay. If the member does not prove this "material affect," the contract can be terminated, however, the court may order the repayment of the member's prior deposit or installment(s).

Life-Insurance Policies

A private insurance policy on the life of a service member which is owned and held by the member may be protected against lapse or termination for nonpayment of premiums while the member is serving on active duty, and for one year thereafter. The policy must have been in effect for at least 180 days prior to the member entering active duty. The court may refuse to grant such relief to the member if in the court's opinion, the ability of the member to comply with the terms of the policy is not "materially affected" by reason of military service.

PROTECTIONS FOR GENERAL OBLIGATIONS

There are four primary areas in which the SSCRA affords protection to military members regardless of whether the obligation was incurred prior to, or after entry on active duty.

Default Judgments

No plaintiff can obtain a default judgment (a judgment for plaintiff based upon defendant's failing to answer or appear) without first filing an affidavit asserting facts showing that defendant is not in the military service. If such facts cannot be shown, or if the defendant is in the military service, the court will appoint an attorney to protect the member's rights. If a default judgment is granted against a military member while on active duty, or within 30 days after leaving active duty, the court may reopen the case if the member can show he/she has a meritorious defense to the action. The member must file an application to reopen the proceeding no later than 90 days

after leaving active duty.

Stays of Court Proceedings

At any stage of a court proceeding involving a military member as either plaintiff or defendant during the member's service on active duty or 60 days thereafter, the member can seek to stay the proceedings. The court will stay the proceedings unless, in the opinion of the court, the member's ability to prosecute or defend the action is not "materially affected" by reason of military service.

Statute of Limitations

The statute of limitations for bringing a civil action is suspended while on active duty. For example, if an individual normally has two years from the date of an accident to sue for an injury, a military member injured during service on active duty would have two years to sue from the date he/she leaves the service. On the flip side, if the military member causes an injury, the injured party will also have the statute of limitations suspended, giving that person more time to sue the military member. If a military member is injured or causes an injury before entering active duty, the statute of limitations stops on the day he/she enters the service, and starts again on the day he/she leaves the service.

Protection from Eviction

A landlord may not evict a military member and/or his/her family or dependents without approval of a court. This protection covers any residence chiefly occupied by the member and/or his/her family or dependents if the rent does not exceed \$1,200.00 per month. The court will grant a three month stay in any eviction proceeding unless it determines that the member's ability to pay is not "materially affected" by virtue of military service.

MATERIAL AFFECT

The SSCRA often refers to "material affect." This requires a showing that military service has put the member at some disadvantage making him/her unable to address the situation adequately. "Material affect" will usually be geographic or financial. For example, the "material affect" of military service may be that the member makes less money than before entry into service, and can therefore not afford the same level of debt as before his/her service. Or, it may be that the member cannot make court appearances at a remote jurisdiction due to stationing and/or deployment.

The following is information about the SSCRA in FAQ format.

What is the Soldiers' and Sailors' Civil Relief Act and who does it protect?

The Soldiers' and Sailors' Civil Relief Act (SSCRA) is a federal law that gives all service persons some important rights as they enter active duty.

When does the SSCRA protect me?

Most SSCRA protection commences on the day you receive your orders to active duty. As a practical matter, you should be ready, and expect to present a copy of those orders to whomever you ask for some right or benefit under the Act.

When you present the orders to your creditor (or other person with whom you are asserting rights under the SSCRA), it is strongly advised that you present a copy of the orders along with a letter of notification (a sample can be obtained at the Legal Services Branch), and send the letter and orders by U.S. Certified Mail, Return Receipt Requested, so that you can prove later, if necessary, receipt of the letter of notification and orders by the creditor.

I have heard that the interest rates on my loans are reduced to 6% by the SSCRA. How do I get my creditors to change my interest rates?

You may be entitled to have the interest rate on some of your loans reduced to 6% for the time you are on active duty. There are a number of special requirements. You need to talk to a Legal Assistance Attorney to ensure you are eligible. You may be eligible if you and your loan meet the following conditions:

- a) You took out the loan during a time when you were **not** on any form of **active duty** in any branch of the military.
- b) The interest rate is currently above 6% per year.
- c) Your military service affects your ability to pay the loan at the regular (pre-service) interest rate. Generally this requirement means that you make less money in the military than you made as a civilian. There are some special legal issues here - you should be ready to talk to your Legal Assistance Attorney about your entire financial situation.
- d) You notified the lender and provided them with a copy of your orders to active duty.

What kinds of loans qualify for the interest rate reductions?

If the loan is otherwise eligible for relief (that is, it was incurred as discussed above and the material affect provision of the SSCRA is satisfied), any loans incurred by the service member

BEFORE his or her entry onto active duty qualify for the SSCRA interest rate relief (except for Government guaranteed student loans), including:

home mortgages;

credit card accounts;

personal loans from banks or credit unions;

department store accounts; and

business loans for which the service member is personally liable as a result of having either signed the promissory note individually or having personally guaranteed the business' debt.

What about the lease on my apartment? I live alone and I will not be there. I want to let my apartment go and put my furniture in storage. Can I get out of my lease?

Generally - **yes**. If you have a lease for a house, apartment, or even a business location, you may be able to get out of the lease when you come on active duty. Here are the requirements:

a) You originally signed your lease when you were not on any form of active duty. You do not have to have a military clause in the lease.

b) You have received your orders to active duty.

c) You gave written notice to your landlord that you want to terminate your lease. You will still have to pay rent for a short while. Your landlord can charge you rent for 30 days after the date your next rent is due, after the date you give your written notice. Example: You give notice on 15 December. Your next rent is normally due 1 January. The landlord can make you pay rent until 31 January. The key is to get the written notice into the landlord's hands as soon as possible.

d) If you attempt to terminate a **business lease**, there are some special considerations that you need to look at. Talk to a Legal Assistance Attorney first.

I have to go to court on a lawsuit that came up over an auto accident last year. How can I get the lawsuit delayed?

If you are a party (one of the people suing or being sued) in a civil case (not a criminal case), your commander can ask the judge to stay or temporarily delay the proceedings until you can appear. Generally, your commander will have to show that military duty is keeping you from going to court. This is a tricky legal area - we recommend you have your civilian lawyer contact a military Legal Assistance Attorney to discuss the best way to proceed in your case.

I am self-employed and I have health coverage that is pretty expensive. Can I stop my health coverage? What will happen when I get off of active duty and I try to start it again -- will I still be covered?

As long as you are on active duty, your health care needs are covered by the military's medical facilities. In addition, your family members will become eligible for coverage. You may want to suspend your civilian coverage. If you do this, the SSCRA will require your civilian insurance company to reinstate your coverage when you get off of active duty. They have to write you a policy. They cannot refuse to cover most "pre-existing conditions." This SSCRA protection applies only to non-employer sponsored health plans (private health insurance). If you are covered by an employer-sponsored health plan, when you return to your civilian job, your reinstatement rights are covered by a different federal law (the Uniformed Services Employment and Reemployment Rights Act --USERRA).

Will I have to pay state income taxes on my pay while I am on active duty?

If your home state taxes military pay, you will have to pay those taxes. If you get assigned to another state, you will still legally be a "domiciliary" of your home state. The state to which the military assigns you cannot tax your military pay. If you moonlight, they can tax that pay - just your military pay is exempt.

I am a doctor or other health care professional and have professional liability insurance in place at the time I am called to active duty. Do I have to *keep* paying the premiums on the policy?

If you make a written request to your malpractice insurance carrier to suspend your coverage for the duration of your service, the carrier must suspend the policy and charge no premiums for the period of the suspension.

Your policy must thereafter be reinstated, but only if within 30 days of your release from active duty, you notify the insurer in writing that you have been released from active duty and wish reinstatement of the policy.

If you have claims-made malpractice coverage, you may not want to terminate all your coverage but negotiate for a reduced payment. You may want to discuss this with your insurance carrier and a Legal Assistance Attorney.

The issues covered in this information sheet are sometimes very complex and you should consult a Judge Advocate or Legal Assistance Attorney for guidance. The Legal Services Branch is located in Building 677 on Wilson Avenue (behind the bowling alley). The office can be reached

at 732-532-4371 for an appointment, or during walk-in hours from 0900 to 1130 on Monday mornings. We look forward to meeting your legal services needs.

The Point of Contact for this subject in the CECOM Legal Office is Ms. Pamela McArthur, (732) 532-4760, DSN 992-4760.

KATHRYN T. H. SZYMANSKI
Chief Counsel

BEING MOBILIZED AND GETTING WORRIED ABOUT YOUR JOB?

The Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) is a federal law that gives employees who leave a civilian job to perform military service the right to return to the civilian job held before entering military service.

Who gets USERRA protection?

USERRA protection applies if you meet all five of these tests:

1. **Job.** Did you have a civilian job before you went on active duty? USERRA applies to all private employers, state governments, and the federal government.
2. **Notice.** YOU (OR A RESPONSIBLE OFFICER FROM YOUR MILITARY SERVICE) MUST GIVE ADVANCE NOTICE TO YOUR EMPLOYER *BEFORE* LEAVING FOR ACTIVE DUTY IF POSSIBLE. Notice can be oral or in writing, but written notice is best, and you should keep a copy of your notice.
3. **Duration.** As a general rule, you can be on active duty away from your civilian job for up to five years.
4. **Character of service.** USERRA protections apply if you are discharged with an Honorable or General discharge. You are not protected if your active duty ends with an Other Than Honorable Discharge, a Bad Conduct Discharge, or a Dishonorable Discharge, or you are dropped from the rolls.
5. **Prompt return to work.** If your military service lasted 30 days or less, you must report back to the first shift which begins after safe travel time from your military duty site plus eight hours to rest. If you are on active duty for 31 to 180 days, you must apply in writing for reemployment within 14 days after completing military service. If you were on active duty 181 days or more, you must apply in writing for reemployment within 90 days. Tell your employer that you worked there before, and that you left for military service. Any of these deadlines can be extended for up to two years if you are hospitalized or recovering from a service-connected injury or illness.

Other USERRA Benefits

Health insurance during service. If you go on active duty for a period of 30 days or less and ask for it, your employer must continue to carry you and your family on the company health plan at the normal cost to you. You can continue coverage for up to 18 months, but your employer can pass on the full cost (*including the company's share*) to you.

Prompt reinstatement. You get your civilian job back immediately if you were gone 30 days or less. After longer service, you must get your job back within a few days.

Status & Seniority. For purposes of status, seniority, and most pension rights (including pay rate) you are treated as if you never left for military service. If your peers got promotions or raises while you were gone, you do too.

Training and other accommodations. Your employer must train you on new equipment or techniques, refresh your skills, and accommodate any service-connected disability.

Special protection against discharge other than for cause. If you are fired within a protected period, your employer must prove the firing wasn't because of your military service. Your protected period varies with the length of your military service.

Immediate reinstatement of health benefits. You and your family may choose to go back on the company health plan immediately when you return to your civilian job. There can be no waiting period and no exclusion of pre-existing conditions, other than for VA-determined service-connected conditions.

Anti-discrimination. USERRA prohibits discrimination based on military service or military service obligation.

Other benefits. USERRA provides certain rights. It does not eliminate any *other* rights you may have, in addition to your USERRA rights, from state law, contract, or collective bargaining agreement.

Enforcement

If you, the Reserve Component member, have a reemployment problem or concern related to military service in the National Guard or Reserves, start by talking with your employer, then your command. If that doesn't resolve the matter, contact the National Committee for Employer Support of the Guard and Reserve (ESGR), Ombudsman (800) 336-4590 or (703) 696-1411. Email: webmaster@esgr.org. ESGR Ombudsmen are qualified to help, sympathetic to the needs of both the employers and employees, and committed to remaining impartial in their counsel. The Ombudsmen Services Program was established in 1974 to provide information, counseling, informal mediation of issues relating to compliance with the USERRA, and referral service to resolve employer conflicts.

You may also contact the U.S. Department of Labor Veterans' Employment and Training Service (VETS). The Department of Labor (DOL) is responsible for resolving and/or investigating reemployment issues. The DOL developed the elaws Advisors to help *employees and employers* understand their rights and responsibilities under numerous Federal employment

laws, including USERRA. Each Advisor includes links to more detailed information that may be useful to the user, such as links to regulatory text, publications, and organizations. The USERRA Advisor URL is: <http://www.dol.gov/elaws/userra0.htm> .

Of note, USERRA also gives you the right to sue your employer. If your lawsuit is successful, and was handled by a private attorney, you may be able to recover court costs and attorney fees from your employer. Sometimes attorneys with the Department of Justice will handle this litigation. You should discuss this with a legal assistance attorney.

Some other useful websites are <http://www.esgr.org> & <http://www.dol.gov/dol/vets>.

If you still have questions, contact your legal assistance attorney at the Fort Monmouth Legal Services Branch at (732) 532-4371. Remember, your military legal assistance attorney may not act as your personal attorney in reemployment disputes, but may refer you to a private attorney or help you request government counsel.

The Point of Contact for this subject in the CECOM Legal Office is Ms. Pamela McArthur, (732) 532-4760, DSN 992-4760.

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DoD Labor Relations Guidance
DoD Telework Policy
October 22, 2001

BACKGROUND:

Section 359 of Public Law No. 106-346, October 23, 2000, states:

“Each executive agency shall establish a policy under which **eligible employees** of the agency may participate in telecommuting to the maximum extent possible without diminished employee performance. Not later than 6 months after the date of the enactment of this Act, the Director of the Office of Personnel Management shall provide that the requirements of this section are applied to 25 percent of the Federal workforce, and to an additional 25 percent of such workforce each year thereafter.”

On October 22, 2001, the Under Secretary of Defense (Personnel and Readiness) issued the Department of Defense (DoD) Telework Policy implementing the requirements of the law. This policy provides that Components may develop their own guidance based on the Department’s overarching policy. Most notably, it defines broad criteria for determining the eligibility of employees and positions for teleworking (telecommuting).

QUESTIONS AND ANSWERS ON BARGAINING OBLIGATIONS:

1) Are these changes subject to bargaining with our union?

Yes, local bargaining obligations must be met. The Federal Labor Relations Authority (FLRA) has ruled that an agency may not make changes to a condition of employment without fulfilling its bargaining obligations. See 41 FLRA 850, 853. The new telework policy does impact the working conditions of bargaining unit employees and is subject to appropriate bargaining.

2) Since law requires this new policy, are we expected to implement this policy by a certain date?

While the goal is to implement this policy as soon as possible, the law does not set a specific target date for an organization at the level of exclusive recognition to implement the policy. It is important to note, however, that the law requires the Office of Personnel Management (OPM) to provide that the requirements of the law are applied to 25 percent of the **eligible** Federal workforce during the first year and an additional 25 percent of such workforce each year thereafter.

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The goal of the DoD policy is for each Component to offer the opportunity to telework to 25 percent of the eligible workforce in the Component (and each year

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thereafter). Therefore, each individual base or installation within your Component has some flexibility in ensuring bargaining obligations are met prior to implementation at the base or installation level (i.e. 25% requirement is at component level, not base level).

3) What if teleworking is already covered by an existing agreement with our union and the union states it does not wish to negotiate over the new policy?

The Authority has ruled that once a collective bargaining agreement becomes effective, subsequently issued rules or regulations, with the exception of Government-wide rules or regulations issued under 5 USC § 2302 (related to prohibited personnel practices), cannot nullify the terms of such a collective bargaining agreement. See 9 FLRA 983. 5 USC 7116(a)(7) provides that it is an unfair labor practice for an agency to enforce any rule or regulation which is in conflict with any applicable collective bargaining agreement if the agreement was in effect before the date the rule or regulation was prescribed. See 39 FLRA 120. Therefore, to the extent that an existing agreement conflicts with DoD policy on teleworking, the agreement will

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prevail. At the time the agreement expires or is up for renegotiation, it would be appropriate to negotiate a new agreement that is consistent with the requirements of the DoD policy.

4) What can the union negotiate concerning the telework policy?

In one early (yet, still applicable) decision of the FLRA involving teleworking, the Authority considered a union proposal which set broad and non-exclusive criteria for the agency to consider when determining whether to permit employees to work from home. The Authority found the proposal to be a negotiable procedure because management was not restricted to the union's proposed criteria. See 1 FLRA 897, 901. The DoD policy does outline criteria for the Components to follow when determining the eligibility of employees and positions for telework. Therefore, when evaluating the negotiability of union proposals on the identification of positions, you should consider the impact on management's statutory rights such as the right to assign work and the right to determine internal security practices.

In another decision, the Authority ruled that the location at which employees perform the normal duties of their jobs is negotiable *unless a relationship exists between the job location and the job duties*. See 39 FLRA 1441, 1443. While this case did not involve a telework issue, it is a good indicator how the FLRA may look at union proposals related to the identification of employees and positions eligible to telework.

Other matters related to teleworking that your union may wish to negotiate include procedures to be utilized for performance appraisals, time and attendance monitoring, applicable grievance procedures, work schedules, overtime, equipment needs, security issues, and workers compensation. However, keep in mind that the goal of the policy is that such matters generally should be treated in the same manner as employees who do not telework. You may have existing contract language on these topics that are just as applicable for employees who telework as any other employee.

As with any union proposal, consideration must be given to management rights, other appropriate laws and regulations, and existing collective bargaining agreements when evaluating union proposals relating to telework. The Field Advisory Services (FAS) Labor Relations Team is available to provide negotiability

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determinations on any union proposal you receive on teleworking. You may contact the FAS Labor Relations Team at (703) 696-6301, Team 3 or DSN 426-6301.

Enclosure 1

Summary of Senior ELS Workshop (1 November 2001)

1. Litigation Update

a. **Judgment Fund Availability (Carrie Greco)** – The judgment fund may be used to satisfy most judgments, DOJ compromise settlements (28 USC Section 2414), and some administrative awards/claims (e.g., FTCA claims over \$2500). Unless, the statutory authority provides otherwise, the judgment fund is available to pay attorney's fees. Attorney fees under RCRA, CAA, CWA, and SDWA are payable out of the judgment fund. Under the Equal Access to Justice Act, attorney fees are payable to prevailing parties out of agencies appropriations. Therefore, attorney fees in NEPA, ESA, and CERCLA cost recovery litigation which are payable under the EAJA must be paid out of agency appropriations.

b. **Makua Range Litigation (MAJ Tim Cody)** – An environmental group challenged the adequacy of NEPA EA to support training at the Makua Range. The Makua Range has approximately 30 endangered species and several culturally significant sites. After the September 11 Attacks, the Army was prepared to resume training at Makua as an emergency action but the case was subsequently settled. Under the settlement, the Army is allowed to resume limited training for the next three years pending completion of an EIS.

2. Restoration/Natural Resource Update

a. **Privatizing BRAC Cleanups (Creighton Wilson)** – The Army is using early transfer authority (Section 334) and cooperative agreement authority (10 USC Section 2701d) at two BRAC installations (Bayonne and Fitzsimmons). At these BRAC installations, the Army will early transfer the property and provide funding for the local reuse authority to finalize the cleanup. This arrangement will allow the Army to have an early transfer and the LRA is able to integrate cleanup and redevelopment of the property.

b. **NEPA Alternate Arrangement for Emergency Circumstances (MAJ Jeanette Stone) and ESA Update (CPT Jeffery Hatch)** – This presentation included a summary of the CEQ Alternate Arrangement Guidance. In addition, it was noted that mobilization/force protection activities may have ESA implications. The installation should determine whether mobilization/force protection activities create new Section 7 consultation requirements or create new incidental take requirements. Note – AMC has prepared NEPA Force Protection Guidance (see below discussion).

3. Compliance Update

a. **Payment of Administrative Fees for CAA Violations (MAJ Liz Arnold)** – Over the past several years, the Army has used payment of administrative fees to resolve 9 CAA cases and 1 CWA case. Under this approach, any administrative fees should be tied to documented costs incurred by the regulators (e.g., inspections, oversight, etc.). It is possible that the administrative fee settlement may exceed the amount of the original fine provided the regulators adequately document their costs. However, we should avoid situations where the administrative fee equals the original proposed fine since gives the appearance that the "administrative fees" are a defacto fine.

b. **Fort Wainwright CAA Case (LTC Chas Green)** – On 4 Oct 01, EPA chief administrative law judge (ALJ) heard oral arguments in Fort Wainwright's challenge to \$16M

in proposed business penalties. The ALJ found Fort Wainwright liable for eight CAA violations but reserved for oral argument issues related to penalty factors.

c. Range CWA Permitting Update (LTC Lisa Schenck/Colleen Rathbun) –

On 15 June 01, the Army received a notice of intent alleging that firing munitions into wetlands at the Eagle River Flats Range (Fort Richardson) requires a CWA permit. This issue could impact DoD-wide training. Under the CWA Section 1323a, the President may issue regulations exempting from CWA requirements “any weaponry, equipment, . . . or other classes or categories of property, and access to such property, which are owned or operated by the Armed Forces and which are uniquely military in nature” if it is in the paramount interest of the U.S. The Army and other services are considering using this authority to propose Presidential regulations exempting ranges from CWA permitting requirements.

4. AEC Update

a. New Army Alternate Procedures (AAP) for NHPA Section 106

Consultation (Scott Farley). The Army has 52K buildings that will become 50 years old within the next 30 years. The new Army Alternate Procedure (AAP) is optional and provides an alternative to the Section 106 consultation process. Under the AAP, the Army consults with stakeholders “up front” to develop a beefed up Historic Properties Component (HPC) of the Installation Cultural Resources Management Plan (ICRMP). The ICRMP is released for public review and submitted to the Historic Preservation Advisory Counsel for certification. After certification, the installation implements the HPC and is no longer required to have external project by project review. A copy of the AAP is available at – <http://www.achp.gov/army.html#aap>. See also the ELD Bulletin (July 2001) – A New Option for Compliance with the NHPA.

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The Military and the Endangered Species Act

Interagency Cooperation

The U.S. Department of Defense (DoD) manages approximately 25 million acres (10 million hectares) on more than 425 major military installations throughout the United States. These installations serve as the bedrock upon which the military services conduct essential training, testing, and basing, thereby providing for the Nation's common defense. For years, access limits due to security considerations and the need for safety buffer zones have sheltered these lands from development pressures and large-scale habitat losses. Most military lands contain rare species and fine examples of rare native plant communities, such as old-growth forests, tall-grass prairies, and vernal pool wetlands. Over 300 federally listed species live on DoD-managed lands.

Endangered species management on military lands remains a challenging and critical focus for DoD's resource managers. Successful endangered species management ultimately depends upon the resource manager's skills and expertise, as well as their use of available tools, training, and resources. DoD's continued interagency cooperation and partnerships with the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) are essential elements toward these efforts.

DoD Guidance on Species Conservation

Since 1960, the Sikes Act has required military installations to provide for the conservation and rehabilitation of natural resources on DoD lands. A recent amendment, the Sikes Act Improvement Act of 1997, requires DoD and its military services (i.e., Army, Air Force, Navy and Marine Corps) to prepare and implement Integrated Natural Resources Management Plans (INRMPs) for each military installation with significant natural resources. INRMPs aim for sustainable natural resources management while ensuring no net loss in the capability of installation lands to support the military mission.

Coexisting with nature, Marines train at Camp Lejeune, North Carolina, in the midst of prime habitat for the endangered red-cockaded woodpecker.



DoD and each military service has implementing instructions for compliance with the Sikes Act, Endangered Species Act (ESA), and other natural resources laws and regulations. The following outlines the main points of these instructions as they pertain to ESA compliance:

- **DoD Instruction, DoDI 4715.3:** Stipulates that procedures to comply with ESA mandates shall emphasize military mission requirements and interagency cooperation during consultation, species recovery planning, and management activities.
- **Army Regulation, AR 200-3:** States that it is an Army goal to systematically conserve biological diversity on Army lands within the context of its mission.
- **U.S. Air Force Instruction 32-7064:** Stipulates that each Air Force installation must develop an overall ecosystem management strategy that provides for the protection and recovery of threatened and endangered species. Also, when practical, the Air Force will provide the same protection to candidate and state-listed species.

■ **U.S. Navy Instruction, OPNAVINST 5090.1B:** Stipulates that the Navy's policy is to act responsibly in the public interest to restore, improve, preserve, and properly utilize natural resources through incorporating ecosystem management principles on Navy lands. The Navy will use its authorities to further programs for the conservation and recovery of federally listed endangered and threatened species. Furthermore, the Navy encourages cooperation with States and territories to protect state/territory listed rare and endangered species.

■ **U.S. Marine Corps Order (MCO) P5090.2A:** States natural resources under the stewardship and control of the Marine Corps will be managed to support the military mission, while preserving, protecting, and enhancing these resources.

What are the Provisions of Section 7 of the Endangered Species Act?

■ Section 7(a)(1) provides that all federal agencies, in consultation with FWS and NMFS, shall use their authorities to further the purpose of ESA by carrying out programs for the conservation of endangered and threatened species.

■ Section 7(a)(2) requires federal agencies to ensure, in consultation with FWS and/or NMFS, that any action authorized, funded, or carried out is not likely to jeopardize the continued existence of any endangered or threatened species or result in destruction or adverse modification of critical habitat.

How does the Section 7 Process (Interagency Cooperation) Work?

■ If a proposed DoD action may affect an endangered or threatened species or designated critical habitat, the agency initiates consultation with the FWS or NMFS, as appropriate.

■ Informal consultation consists of any discussions between the federal agencies, applicants, and FWS and/or NMFS to determine if there are ways to avoid adverse effects to listed species and designated critical habitat from the proposed project. If modifications are developed to avoid all such effects, consultation is concluded. It is FWS policy to use informal consultation to the fullest extent possible.

■ If adverse effects are unavoidable, formal consultation is initiated. FWS evaluates the status of the species, the environmental baseline, and the effects of the proposed action to determine if the project may jeopardize the continued existence of the listed species. If critical habitat for the species is designated, the FWS determines whether the project will destroy or adversely modify critical habitat.

■ As a result of formal consultation, the FWS produces a document called a Biological Opinion (BO). If the BO concludes the action is not likely to jeopardize the species or destroy or adversely modify critical habitat, FWS will provide an incidental take statement, which anticipates the amount of take of the species that may occur incidental to the project. The incidental take statement also includes reasonable and prudent measures with specific terms and conditions to be carried out by the federal agency or applicant that will minimize incidental take. The incidental take statement exempts the federal agency and applicant from violating the ESA for the specified amount of take.

■ If a BO concludes the proposed action is likely to jeopardize the continued existence of a species or destroy or adversely modify designated critical habitat, it provides reasonable and prudent alternatives to the proposed action that will avoid jeopardy or adverse modification or destruction of critical habitat. Such

alternatives must be consistent with the intended purpose of the action, be within the authority of the federal agency, and be technologically and economically feasible. If the alternative action may result in incidental take, an incidental take statement will be included.

■ A BO also includes discretionary conservation recommendations that guide a federal agency in using its authorities to further conserve endangered and threatened species.

■ A federal agency or applicant may request an exemption from complying with reasonable and prudent alternatives set forth in a BO by filing an appeal with the Endangered Species Committee. Exemptions granted by the Endangered Species Committee are rare. However, section 7 (j) provides for an exemption for reasons of national security.

Involvement in the Listing and Critical Habitat Designation Process

Because DoD lands support numerous listed, proposed, and non-listed species, DoD resource managers should be aware of actions by FWS or NMFS to propose new species for listing, place species on the candidate list, and designate critical habitat. These listings and critical habitat designations may include species and areas found on military lands. It is recommended that DoD installations do the following:

■ Address listed species and designated critical habitat in the development and implementation of INRMPs.

■ Monitor announcements published in the *Federal Register*, to be aware of upcoming proposals for listing or designations.

■ Provide comments on proposed actions. Once a notice is published in the *Federal Register*, installations usually will have 60 days to comment. Comments should be solicited from all applicable installations, major commands or claimants, and headquarters, as necessary. Comments should include:

- Any data or information collected on the installation about the species' presence or its habitat.
- Information on any increases in economic and other relevant impacts from critical habitat, such as increases in administrative burden, conflicts with military mission, and benefits of proposed action.

● Relevant provisions within an existing INRMP

● Any other comments that may affect and/or influence decision-making.

Under section 4(b)(2) of the ESA, an area may be excluded from critical habitat if it is determined that the benefits of exclusion outweigh the benefits of specifying an area as part of critical habitat.

Management Plans

When designating critical habitat, the FWS determines whether an area needs additional special management or protection. If a conservation and management plan, such as an INRMP, already exists, the FWS may decide that the area covered by the plan does not meet the definition of critical habitat.

To qualify, plans/INRMPs must provide:

- A conservation benefit to the species;
- Ensured implementation of the plan; and
- Ensured effectiveness of conservation efforts.

References

■ FWS's Endangered Species Program web page at <http://endangered.fws.gov> offers a variety of information, such as up-to-date lists of threatened and endangered species, proposed and candidates species for listing, state lists, *Federal Register* notices for final and proposed actions, and guidance and instructions.

■ The regulations for interagency cooperation under ESA may be found in the U.S. Code of Federal Regulations at http://www.access.gpo.gov/nara/cfr/waisidx_00/50cfr402_00.html. The FWS/ NMFS consultation handbook may be found at <http://endangered.fws.gov>.

■ To read the full text of the Sikes Act Improvement Act or to learn more about DoD's natural resources conservation program, see the Defense Environmental Network & Information eXchange (DENIX) web site at <https://www.denix.osd.mil/denix/Public/ES-Programs/Conservation/conservation.html>.

AMCCC-G

6 April 2001

**AMC POLICY
ON
COORDINATING ENVIRONMENTAL AGREEMENTS**

1. Definition. Environmental Agreements are formal agreements between Installation Commanders and Federal, state, and local environmental regulators to evaluate, identify, or correct actual or potential environmental deficiencies. Environmental agreements include but are not limited to orders on consent, compliance agreements, consent agreements, settlements, federal facility agreements, and interagency agreements. Agreements will be forwarded through command legal channels to Environmental Law Division (ELD) for review prior to signature. AR 200-1, paragraph 15-8.

2. Notification Requirements

a. Enforcement Action (ENF) Environmental Agreements. If the installation receives an ENF, which will require negotiation of an environmental agreement (e.g., Consent Agreement), the installation should report the ENF in accordance with the U.S. Army Materiel Command (AMC) Guidelines as described in reference memorandum, HQAMC, AMCIS, 20 November 2000, Subject: Reporting Enforcement Actions and Fines.

b. Non-ENF Environmental Agreements. If the installation seeks to negotiate a non-ENF environmental agreement, the installation will provide an information paper through the MSC to HQ AMC. The information paper will provide (1) background and history, (2) purpose of the proposed environmental agreement, and (3) the installation points of contact.

3. Negotiation Process

Installations are strongly encouraged to work closely with their higher headquarters legal and environmental offices throughout the entire environmental agreement negotiation process. In addition, installations should follow the guidance set forth in the attached Draft DA Pam 200-1 Consent Agreement Checklist (**Enclosure 1**) and the Army ELD Consent Agreement and Consent Order (CACO) Review Checklist (**Enclosure 2**). Note: the checklists are designed primarily for ENF environmental agreements but should be used to the extent applicable for non-ENF environmental agreements.

4. Approval Process

After an agreement has been negotiated, the draft agreement will be forwarded through command legal and environmental channels to Army ELD for review prior to signature. The draft agreement should include a memorandum/e-mail message explaining, (1) the parties involved in the agreement, a brief description of the problem, and the proposed corrective actions and (2) total cost associated with the agreement, the source of funding, and confirmation of approval from the funding organization.

5. Distribution of Signed Agreements

A copy of the signed agreement will be promptly faxed to the Army ELD, AMC Legal Office, and MSC Legal Office.

ENCLOSURE 1

DRAFT DA PAM 200-1 CONSENT AGREEMENT CHECKLIST

If the installation receives an enforcement action (e.g., Notice of Violation or proposed Consent Agreement) the installation should take the following steps:

1. Carefully review the enforcement actions to determine the validity of the alleged violation.
2. Prepare a response identifying all disputed violations and any legal defenses (e.g., sovereign immunity, etc.), and coordinate response, including legal review where applicable, with program and legal offices at higher headquarters.
3. Take appropriate action to preserve the installation's right to a hearing (e.g., submit a timely answer and request for a hearing). Installations are encouraged to seek guidance and legal review on all pleadings and significant stages of the Consent Agreement negotiation process from higher headquarters and HQDA.
4. Develop a compliance plan with a realistic compliance schedule to correct violations in a reasonable and cost effective manner.
5. If the enforcement actions involves a proposed fine, the installation should:
 - Obtain a copy(s) of the penalty calculation sheets or other documentation justifying the amount of the fine.
 - Ensure that any fine is based on valid violations and is consistent with the regulator's policy regarding environmental fines.
 - Identify possible supplemental environmental projects (SEP) to further offset the amount of the fine.
 - Negotiate the lowest possible fine.
1. Initiate settlement discussions with regulators to resolve disputed violations and develop a reasonable Consent Agreement. Coordinate all drafts of the Consent Agreement with higher headquarters and HQDA. To the maximum extent possible, follow HQDA (DAJA-EL), guidance on inclusion of boilerplate and other language advantageous to both the installation and the Army.
2. Installations are encouraged to work closely with their higher headquarters legal and environmental offices throughout the entire Consent Agreement negotiation process.
 - MACOM assistance may be required to negotiate agreements if an installation has difficulty with state and/or EPA regulators.
 - If a MACOM determines that a reasonable Consent Agreement cannot be negotiated, the MACOM will elevate negotiations to HQDA.
8. All draft Consent Agreements will be submitted through command legal channels to HQDA, Office of the Judge Advocate General (OTJAG), ATTN: DAJA-EL for approval prior to signature by the installation commander.

9. Installation should, where practicable, negotiate for inclusion of the following in environmental agreements:
 - A dispute resolution provision.
 - A force majeure provision.
8. Funding language, including a statement that nothing in the agreement will be interpreted to require any expenditure in violation of the Anti-Deficiency Act (31 USC 1341).

ENCLOSURE 2

Army ELD Environmental Criminal and Civil Liability Handbook CACO Legal Review Checklist

No.	Checklist Item	pg.
1.	Ensure that the party or parties listed in the Heading is the same as those named in the complaint	77
2.	Ensure that the authority under which the complaint was issued is correctly cited	78
3.	Ensure that the regulator is not reserving for itself any enforcement rights with regard to the present enforcement action	78
4.	Ensure that any concession to the regulator's jurisdiction only covers the present action	79
5.	Ensure that the jurisdiction concession limits stipulated penalty authority to the terms of the present agreement	79
6.	Ensure that the CACO specifies that the installation does not admit to any of the facts as alleged in the order or the complaint, and contains no language that could be interpreted to the contrary	80
7.	Check for inaccuracies in the facts	81
8.	Ensure that the CACO includes changes to the original complaint	81
9.	Ensure that the compliance certification is not an open-ended future certification	81
10.	Ensure that the officer required to make the certification is acceptable to the command	82
11.	If Respondent is required to bear its own costs, ensure the requirement also applies to Complainant	82
12.	Delete any provision requiring, in the event the filing of a civil action is necessary, that the installation agrees to pay reasonable attorney fees and costs	82
13.	If the CACO includes a requirement to provide the CACO to employees, agents, and contractors, ensure that the requirement has a termination clause and that the task can be accomplished	83
14.	Scrutinize the language ordering payment of cash for consistency with SEP offset figures	84
15.	Ensure that the ordered fine does not embody any pre-FFCA violations, or multi-inspection violations	84
16.	Ensure the fine does not double-count the same violation(s) allegedly detected during more than one inspection	85
17.	Ensure stipulated penalty figures are not excessive	86
18.	Contest a stipulated penalty provision that is triggered by under spending	86
19.	Watch for unreasonable requirements concerning satisfactory completion of the SEP and SEP Completion Reports	86
20.	Include in the CACO an acceptable dispute resolution provision, with the final decision-maker being a political appointee detached from the dispute	87
21.	(State agreement) Contest language specifying that the CACO shall be enforceable by the filing of a civil action in the relevant district of the	89

No.	Checklist Item	pg.
	State court	
22.	Ensure that RCRA corrective action expenditures do not anticipate use of DERP funds to offset a portion of the RCRA penalty	93
23.	Ensure that both parties have a clear understanding of the current state of corrective action and what more the order requires	94
24.	Contest any language that purports to charge the installation interest on late payments	94
25.	Ensure inclusion of appropriate Anti-Deficiency Act language	95
26.	Ensure inclusion of appropriate force majeure language	96
27.	Ensure that the agreement is tailored to the present settlement, without unnecessary boilerplate	96

NOTE - A full explanation of each checklist item can be found in the Army ELD Handbook on the page listed.

INFORMATION PAPER

AMCCC-G
5 November 2001

SUBJECT: Apparent Conflicts of Interest/Covered Relationships

1. Purpose. To provide information on apparent conflicts of interest/covered relationships.

2. Facts.

a. Appearances of Conflicts. By regulation, employees may not participate in official matters when someone with knowledge of the relevant facts would reasonably question their impartiality. An employee could have an appearance of a conflict of interest when a member of the employee's household or someone with whom the employee has a "covered relationship" is a party to the official matter, or represents a party to that matter. Additionally, an employee who is concerned that other circumstances would raise questions about the employee's impartiality should notify the agency to allow it to determine whether the employee should participate in a particular matter. An employee has a "covered relationship" with:

(1) A person with whom the employee has some sort of business or financial relationship, *e.g.*, a supervisor should not participate in rating or other employment decisions affecting an employee who rents his condominium;

(2) A relative with whom the employee has a close personal relationship;

(3) A prospective or current employer of the employee's spouse, parent, or dependent child (the situation here with respect to the Army employee's spouse or dependent child must be carefully examined to ensure that there is not an actual conflict);

(4) Any organization in which the employee served as an officer, director, or employee within the last year;

(5) An organization in which the employee is an "active participant."

b. Resolutions of Apparent Conflicts of Interest. In cases of an apparent conflict of interest/covered relationship, the employee is **disqualified** from acting on official matters unless the "Agency designee" (the employee's immediate supervisor with the concurrence of the Ethics Counselor or for General Officers in command, the General Officer's Ethics Counselor) determines that in light of all relevant circumstances, that the interest of the Government in the employee's participation outweighs the concern that a reasonable person may question the integrity of the agency's programs and operations. The ultimate question is whether the circumstances would cause

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SUBJECT: Apparent Conflicts of Interest/Covered Relationships

a reasonable person with knowledge of the relevant facts to question the official's impartiality in the matter. Factors to consider are:

- (1) The nature of the relationship involved;
- (2) The effect that resolution of the matter would have upon the financial interests of the person involved in the relationship;
- (3) The nature and importance of the employee's role in the matter, including the extent to which the employee is called upon to exercise discretion in the matter;
- (4) The sensitivity of the matter;
- (5) The difficulty of reassigning the matter to another employee; and
- (6) Adjustments that may be made in the employee's duties that would reduce or eliminate the likelihood that a reasonable person would question the employee's impartiality.

c. Employee Authorizations. If an employee is authorized to participate in a particular matter, the following apply:

- (1) The authorization shall be documented in writing at the agency designee's discretion or when requested by the employee. The best practice is to document all authorizations in writing.
- (2) Once an employee is authorized to participate in the matter, the employee may not then disqualify himself or herself from participation in the matter on the basis of an appearance problem involving the same circumstances that have been considered by the agency designee.
- (3) The authorization protects the employee from any charge that the employee should have been disqualified from participation in the matter. It does not automatically protect the agency decision authorizing the employee's participation from outside attack. *See, e.g., DZS/Morris Knudsen Corp.*, B-281224 et al., Jan. 12, 1999, 99-1 CPD 19. In other words, other statutes and regulations, such as the FAR, may establish higher standards of conduct than the ethics regulations.

Robert H. Garfield/617-8003

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